

No. 14708

United States
Court of Appeals
for the Ninth Circuit

ALLSTATE INSURANCE COMPANY, a Cor-
poration, Appellant,

vs.

OSCAR F. ERICKSON, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern
District of California, Southern Division

FILED

MAY -2 1955

PAUL P. O'BRIEN, CLERK

No. 14708

United States
Court of Appeals
for the Ninth Circuit

ALLSTATE INSURANCE COMPANY, a Cor-
poration, Appellant,
vs.

OSCAR F. ERICKSON, Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern
District of California, Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint	11
Appeal:	
Certificate of Clerk to Transcript of Record	
on	44
Designation of Record on (DC).....	40
Designation of Record on (USCA).....	185
Notice of	40
Order Extending Time to Docket.....	44
Statement of Points on (USCA).....	183
Undertaking on	42
Certificate of Clerk to Transcript of Record..	44
Complaint	3
Designation of Record on Appeal (DC).....	40
Designation of Record on Appeal (USCA)....	185
Findings of Fact and Conclusions of Law.....	36
Judgment	39
Minute Orders:	
Dec. 7, 1953—Ordered Motion to Dismiss—	
Denied	9
July 12, 1954—Ordered Motion to Dismiss	
for Failure to Answer Interrogatories—	
Denied	11

ii.

Names and Addresses of Attorneys.....	1
Notice of Appeal	40
Notice of and Motion to Dismiss on Ground of Lack of Jurisdiction	7
Notice of and Motion to Dismiss Action on Ground that Plaintiff Has Failed to Answer Interrogatories	10
Notice of Motion for Order to Reopen Cause for Further Authorities and Evidence.....	19
Points and Authorities in Support of.....	21
Opinion	15
Order Denying Motion for Order Setting Aside the Decision	35
Order Denying Motion to Dismiss on Ground of Lack of Jurisdiction	9
Order Denying Motion to Dismiss for Failure to Answer Interrogatories	11
Order Extending Time to Docket Appeal.....	44
Statement of Points to be Relied Upon on Ap- peal (USCA)	183
Transcript of Proceedings and Testimony.....	46

Witnesses:

Aiello, Joe

—direct

108

—cross

110

Transcript of Proceedings—(Continued)

Witnesses—(Continued)

Cowden, G. M.

—direct	127
—cross	130
—redirect	130
—By the Court	130

Daly, William

—direct	159
---------------	-----

Erickson, Birdella

—direct	113
—cross	124

Erickson, Oscar F.

—direct	58
—cross	78
—redirect	96, 107
—recross	106, 108
—rebuttal, direct	168

Gamber, Val

—direct	132
—voir dire	144

Gordon, Al

—direct	151
—cross	155

Pond, William

—direct	163
---------------	-----

Wood, Fred

—direct	145
—cross	148

Undertaking on Appeal to Stay Execution....	42
---	----

NAMES AND ADDRESSES OF ATTORNEYS

HEALY & WALCOM,

58 Post Street,
San Francisco, California,

Attorneys for Defendant and Appellant.

PAUL FRIEDMAN,

631 Phelan Building,
San Francisco, California,

Attorney for Plaintiff and Appellee.

In the District Court of the United States, North-
ern District of California, Southern Division

No. 33,005

OSCAR F. ERICKSON, Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY, a cor-
poration, Defendant.

COMPLAINT ON INSURANCE POLICY

Plaintiff for a cause of action against Defendant
states and alleges as follows:

I.

That Plaintiff is a citizen of the State of Cali-
fornia.

II.

That Defendant is a corporation duly incorpor-
ated and organized under the laws of the State of
Illinois, and is a citizen of such State, with its prin-
cipal office and place of business at Chicago, Illinois,
and is doing business in the State of California.

III.

That this is an action upon a contract of automo-
bile liability insurance issued by an agent of De-
fendant in the State of California, to Plaintiff that
jurisdiction of this Court is based upon the fact of
the existence of a controversy between Plaintiff
and Defendant as citizens of different States, and
the amount in controversy in this cause of action

exceeds the sum of \$3,000.00 exclusive of interest and costs.

IV.

That on or about the 17th day of December, 1952, in the State of California, in consideration of the payment of a premium therefor, Defendant issued to Plaintiff its policy of automobile insurance for a period of one year, reading as follows:

“II. Coverage C—Medical Payments Insurance
To pay all reasonable expenses, incurred within one year from the date of accident, for necessary medical, dental, surgical, ambulance, hospital, professional nursing and funeral services and prosthetic devices to or for any person who sustains bodily injury, caused by accident, while in or upon, entering or alighting from (1) the owned automobile or a substitute automobile, while being used by or with the permission of the named insured or spouse, or (2) a non-owned automobile, if the injury arises out of its occupancy or operation by the named insured or spouse or out of its operation for either by a servant.”

“* * * C. Medical Payments—Each person \$2,000.00”

“III. Coverage D—Collision and Upset Insurance.
To pay for loss to the owned automobile caused by its collision with another object or by its upset, less the deductible amount stated on the Supplement Page.”

“* * * D. Collision or Upset—Diminishing. Deductible—Actual Cash Value Less \$50.00 Deductible.”

The automobile referred to in said policy of insurance was a 1951 Studebaker Sedan Automobile bearing Motor No. 19458.

V.

That on or about the 15th day of February, 1953, while Plaintiff's wife, Birdella Erickson, was driving said insured vehicle in the State of California, she suffered a collision and upset which resulted in personal injuries to herself and to Plaintiff, who was riding with said Birdelle Erickson in said vehicle at that time, and in damage to the vehicle which Plaintiff is informed and believes and therefore alleges on information and belief, amounts to total destruction thereof. The personal injuries required necessary medical, surgical, ambulance, hospital and nursing expenditures and indebtedness to be incurred by Plaintiff for himself and his wife.

VI.

Plaintiff is informed and believes and therefore alleges on information and belief that the loss suffered by him in the destruction of his automobile is the value of said vehicle, which he is informed and believes and therefore alleges on information and belief was in the sum of \$2,000.00 at that time. Plaintiff is informed and believes and therefore alleges on information and belief that indebtedness incurred and to be incurred by Plaintiff for medical bills for his wife, Birdelle Erickson, and himself approximates \$2,000.00.

VII.

Plaintiff has made claim upon Defendant to pay for the loss of his automobile and for the medical expenses incurred as a result of this collision and upset, and although Plaintiff has duly performed all the conditions of the contract of insurance to be performed on his part, Defendant refuses and has failed to perform the terms of the contract of insurance herein alleged, and has failed and refused to make any payment or reimbursement to Plaintiff pursuant to the terms of said insurance contract, and have tendered to Plaintiff the return of premium paid by him and have declared that they are not bound by their contract, thereby waiving the presentation by Plaintiff of any formal proofs of claim or loss.

Wherefore, Plaintiff prays judgment against the Defendant in the sum of \$4,000.00 for costs of suit, and for such other and further relief as to the Court may seem just and proper in the premises.

/s/ PAUL FRIEDMAN,
Attorney for Plaintiff

Duly Verified.

[Endorsed]: Filed August 20, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS ON
GROUND OF LACK OF JURISDICTION
UNDER RULE 12(b)

To the Plaintiff above named and to Paul Friedman, Esq., his attorney:

You and Each of You Please Take Notice that the defendant Allstate Insurance Company, a corporation, will bring the attached motion on for hearing before the above entitled Court, on the 7th day of December, 1953, at the hour of 9:30 a.m. of said day, or as soon thereafter as counsel can be heard.

Dated: November 23, 1953.

HEALY & WALCOM,
/s/ LEO J. WALCOM,
Attorneys for Defendant

Memorandum of Authorities

Rule 7(b), Federal Rules of Civil Procedure.

Rule 12(b), Federal Rules of Civil Procedure.

MOTION TO DISMISS ON GROUND OF LACK
OF JURISDICTION UNDER RULE 12(b)

The defendant Allstate Insurance Company, a corporation, under Rule 12(b), Federal Rules of Civil Procedure, moves the court as follows:

I.

To dismiss the action on the ground that the Court lacks jurisdiction because the amount actually in controversy is less than Three Thousand and No/100 Dollars (\$3,000.00), exclusive of interest and costs.

It appears from the complaint that on the 15th day of February, 1953, the casualty involving the loss of the automobile occurred, and plaintiff alleges on information and belief his automobile was totally destroyed; that said complaint was filed on August 20, 1953, some six (6) months after the alleged casualty and plaintiff must know the value of his loss, by the total destruction of his automobile, and the same should be set forth herein.

II.

That the alleged casualty causing injury to Birdella Erickson occurred on February 15, 1953, and plaintiff alleges on information and belief medical bills incurred and to be incurred will be in the sum of Two Thousand and No/100 Dollars (\$2,000.00). Plaintiff must certainly know the amount of the expenditures, and that it should be set forth in the complaint.

III.

That on information and belief it appears that the actual damage to the automobile, and the medical expenses incurred and to be incurred is sub-

stantially less than the jurisdictional limits of this Court.

HEALY & WALCOM,
/s/ LEO J. WALCOM,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 24, 1953.

[Title of District Court and Cause.]

MINUTE ORDER

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Monday, the 7th day of December, in the year of our Lord one thousand nine hundred and fifty-three.

Present: the Honorable Louis E. Goodman, District Judge.

This case came on regularly this day for hearing of motion to dismiss. After hearing Leo J. Walcom, Esq., for defendant, and Paul Friedman, Esq., for plaintiff, Ordered motion to dismiss be Denied. Ordered that defendant have five (5) days within which to answer, and that defendant have five (5) days within which to answer complaint.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS ACTION

To the Plaintiff above named and to Paul Friedman, Esq., his attorney:

You and Each of You Please Take Notice that the defendant Allstate Insurance Company, will, on the 12th day of July, 1954, at the hour of 9:30 a.m. of said day, or as soon thereafter as counsel can be heard, in the Law and Motion Department of the above entitled Court, bring the attached motion before this Court.

Dated: July 6, 1954.

HEALY & WALCOM,
/s/ LEO J. WALCOM,
Attorneys for Defendant

Motion to Dismiss on Ground That Plaintiff Has
Failed to Answer Interrogatories Propounded
by Defendant

The defendant move the court as follows:

To dismiss the action on the ground that plaintiff has failed to serve upon defendant answers to interrogatories submitted under Rule 33, after proper service of such interrogatories upon plaintiff by defendant.

HEALY & WALCOM,
/s/ LEO J. WALCOM,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 7, 1954.

[Title of District Court and Cause.]

MINUTE ORDER

At a Stated Term of the United States District Court for the Northern District of California, Southern Division, held at the Courtroom thereof, in the City and County of San Francisco, on Monday, the 12th day of July, in the year of our Lord one thousand nine hundred and fifty-four.

Present: the Honorable O. D. Hamlin, District Judge.

This case came on regularly this day for hearing of motion to dismiss. After hearing Paul Friedman, Esq., attorney for plaintiff, and John J. Healy, Esq., attorney for defendant, Ordered that plaintiff answer interrogatories 3, 4, and 8, and that defendant have five (5) days thereafter to plead, to commence from receipt of answers to interrogatories. Ordered motion to dismiss for failure to answer interrogatories be Denied.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now the defendant Allstate Insurance Company, a corporation, and in answer to the complaint of plaintiff on file herein, admits, denies and alleges:

I.

Answering the allegations of Paragraph III of

said complaint, this answering defendant denies that the amount in controversy exceeds the sum of \$3,000.00 exclusive of interests and costs.

II.

Answering the allegations of Paragraph V of said complaint, this answering defendant denies that said vehicle was totally destroyed in the said collision.

III.

Answering the allegations of Paragraph VI of said complaint, this answering defendant denies each and every, all and singular, generally and specifically, the allegations contained therein.

IV.

Answering the allegations of Paragraph VII of said complaint, this answering defendant denies that plaintiff has duly performed all the conditions of the contract of insurance to be performed on his part and admits that it has refused to make any payment under the terms of said contract and has returned the premium paid for said policy and notified plaintiff that the policy is void in its inception because of breach of warranty in that plaintiff misrepresented to defendant in his application for the insurance policy in question that he had not had previous automobile insurance cancelled.

As and for a Second, Separate, Distinct and Further Answer and Defense to the Complaint of Plaintiff, this Answering Defendant alleges:

I.

That on the 17th day of December, 1952, plaintiff applied at the office of the defendant at Santa Rosa, California, for a policy of insurance; at the time of said application plaintiff was asked whether or not during the past two years an insurer had cancelled or refused automobile insurance to him and answered in writing in the negative; thereafter there was issued to plaintiff a policy of automobile insurance No. S-436437-12-18 on a Studebaker De-Luxe Four-Door Sedan, commencing on the 17th day of December, 1952, and for a period of one year thereafter; that said policy of insurance issued by plaintiff to defendant stated, among other things, the following:

"The Allstate Insurance Company, a stock company, Home Office Chicago, in reliance upon the declarations on the supplement page and subject to the limits of liability exclusions, conditions and other terms of this policy and for payment of the premium, Allstate agrees with the name insured * * *

* * * * *

Supplement Page.

"7. During the past two years with respect to the named insured or to any member of his household no insurer has cancelled or refused any automobile insurance. * * *

"The Following Conditions Apply To All Coverages:

"1) Effective policy acceptance:

"By acceptance of this policy the named insured agrees that the declarations on the supplement page

are his agreements and representations and that the declarations on the supplement page are his agreements and representations and that this policy embodies all agreements relating to this insurance existing between himself and Allstate or any of its agents."

II.

That the representations of the plaintiff to the defendant in writing that no insurer had ever cancelled any automobile insurance issued or refused any automobile insurance to the applicant or to any of his household were false in that on the 15th day of December, 1952, the State Farm Insurance Company notified in writing that it was then cancelling an existing policy of automobile insurance issued to him and refusing to extend coverage thereafter because of an undesirable risk record; that defendant would not have issued to plaintiff the said policy of insurance in controversy had it been truthfully informed by him that he previously had automobile insurance cancelled and further coverage refused.

Wherefore, this answering defendant prays that plaintiff take nothing by his complaint and that defendant have judgment thereon, for costs of suit and for such other and further relief as to the court may seem meet.

HEALY & WALCOM,

/s/ By LEO J. WALCOM,

Attorneys for Defendant

Duly Verified.

[Endorsed]: Filed July 19, 1954.

[Title of District Court and Cause.]

OPINION

Hamlin, District Judge.

This is an action to recover upon an automobile insurance policy issued by the defendant, Allstate Insurance Company, to the plaintiff, Oscar F. Erickson. The defendant seeks to avoid liability by declaring the policy void from the date of issuance because of the alleged falsity of a material representation made by the plaintiff in the policy, which alleged false representation was relied upon by the defendant in issuing the policy to the plaintiff.

The representation in question is one of the printed "Declarations" on the "Supplement Page" of the policy, and reads as follows: "During the past two years, with respect to the named insured or to any member of his household, no insurer has cancelled or refused any automobile insurance nor has any license or permit to drive an automobile been suspended, revoked or refused." The policy contains certain printed conditions, among which is the following: "1. Effect of policy acceptance: By acceptance of this policy the named insured agrees that the Declarations on the Supplement Page are his agreements and representations, and that this policy embodies all agreements, relating to this insurance, existing between himself and Allstate or any of its agents." The application for the policy, which was signed by the plaintiff, contains the following printed question among others: "Has

any insurer ever cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household? [] Yes. No. [x].” The insurance policy was issued by the defendant, in reliance on these statements, to the plaintiff effective 12:01 a.m. December 18, 1952. The application for insurance was made about 6 p.m. on December 17, 1952, shortly after the plaintiff had received a letter from the State Farm Mutual Automobile Insurance Company with whom he was then insured. This letter was dated December 15, 1952, and read: “It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy * * * [Your policy] is being cancelled effective 12:01 a.m. Standard Time on the 27th day of December, 1952, and no further protection will be afforded after that date.” A check for the unearned premium on the policy was enclosed in the letter and cashed some time later by the plaintiff. On February 15, 1953, the automobile covered by the Allstate policy was involved in a collision, as a result of which the automobile was a total loss and certain medical and hospital bills were incurred by the plaintiff and his wife.

The receipt of the letter by the plaintiff shortly before he made application for the policy here sued upon is the sole ground upon which the defendant rests its contention that the representations in the application and policy were false. The principal question thus raised is whether the receipt of a letter from an insurer stating that an existing policy “is being cancelled” effective at a future date

renders false a representation that "no insurer has cancelled or refused any automobile insurance" made to another insurer after receipt of the letter but before the future effective cancellation date.

No authority dealing with this question has been submitted by counsel in this case. It may be conceded that the insurer could have asked the applicant whether he had received notice that any policy held by him was being cancelled, and that if an affirmative answer had been given the insurer would not have issued the policy which is here sued upon. But a plain reading of the representations disclose that this information was not called for, and that the representations were not in fact false. It is well settled that the language of an insurance policy is to be construed most strongly against the insurer who wrote that language. *California Civil Code* §1654; *Island vs. Fireman's Fund Indemnity*, 1947, 30 Cal. 2d, 184, P.2d 153; *Farmers Automobile Inter-Insurance Exchange vs. Calkins*, 1940, 39 Cal.App. 2d 390, 103, P.2d 230; *Woodman vs. Pacific Indemnity Co.*, 1939, 33 Cal.App. 2d 321, 91, P.2d 898. The insurer here was a national company doing business throughout the nation. It maintains a booth in various Sears stores for the purpose of selling insurance, and the policy in question was issued at such a booth. It was in a position to know of the possibility that facts such as prevail here might arise. Any printed questions or declarations that the insurance company felt were proper or desirable could have been printed in the application and

policy. It chose to phrase the language used in the manner set out above. If it desired more detailed or other information, it could have asked for it. The answer of the plaintiff, taken literally, was not false. The plaintiff did not make these statements with bad faith or with any intent to deceive or falsify. When he stated that his previous insurance had not been cancelled, he was not in error. It was being cancelled some ten days later. Therefore, there was no false representation or breach of warranty by the insured, and the insurer will not be permitted to void the policy from its inception on that ground.

Plaintiff's complaint alleges, and prays for, damages in the sum of \$4,000. Defendant argues that jurisdiction cannot be retained by this court, since the damages proved on the trial amounted to less than \$3,000. The rule is that the amount in controversy is controlled by the claim in the complaint, if apparently made in good faith, and the inability of the plaintiff to recover over \$3,000 and a judgment for less than that sum, do not oust this court of jurisdiction. *Saint Paul Mercury Indemnity Co. vs. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845, 1938. There was no showing that the plaintiff's claim for an amount in excess of \$3,000, although incorrect, was not made in good faith, and hence the jurisdiction of this court is established.

The Court finds that the damages suffered by the plaintiff amount to \$2,067.72. This includes the value of the automobile and the medical and hospital expenses.

Let judgment be entered accordingly. Plaintiff to prepare findings of fact and conclusions of law.

Dated: November 29, 1954.

/s/ O. D. HAMLIN,

United States District Judge

[Endorsed]: Filed November 30, 1954.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR ORDER TO RE-
OPEN CAUSE FOR FURTHER AUTH-
ORITIES AND EVIDENCE

To the Plaintiff Above Named and to Paul Friedman, Esq., his attorney:

You and Each of You Please Take Notice that on Thursday, the 16th day of December, 1954, at the hour of 10:00 a.m. of said day, or as soon thereafter as counsel can be heard, in the Courtroom of the Honorable Oliver D. Hamlin, the defendant herein will move said Court for an order setting aside the submission and decision in the above entitled action and to allow presentation of further evidence and authorities on the question of the point raised in the decision heretofore rendered by this Court concerning whether or not the letter of State Farm Mutual of December 15, 1952, addressed to the plaintiff, constituted a cancellation, which would make a misrepresentation on the part of plaintiff in

discussed. The language from the Moldenhauer case, which is quoted at the top of Page 8, with emphasis by underlining, stated that State Farm Mutual Insurance Company had before plaintiff (Allstate) issued its policy, notified Moldenhauer that it was cancelling his insurance and he was informed that the State Farm policy was cancelled because of the number of small accidents in which he had been involved. This portion of the opinion at page 664 thereof, would certainly constitute the authority that at the time that the representation was made that "no insurer had cancelled or refused any automobile insurance," after receipt by the applicant of the letter notifying him of cancellation, but before the effective date of cancellation, was, in fact, a cancellation within the meaning of the inquiry set forth in the application. In order that there should be no question in the mind of the Court, we have procured the transcript of the testimony in the case of Allstate Insurance Co. vs. Moldenhauer, *supra*, which was pending in the District Court of the United States, for the Eastern District of Wisconsin, being numbered therein 4597. We desire to make said transcript available to the Court and counsel for reference, and particularly call to the attention of the Court the facts in the Moldenhauer case, which are entirely identical with those in the instant case.

The judgment in the Moldenhauer case was for the plaintiff, Allstate Insurance Company, and on appeal to the United States Court of Appeals, for the Seventh Circuit, was affirmed therein. With re-

ference to the testimony from the official transcript of record filed in the United States Court of Appeals, for the Seventh Circuit, it appears that the State Farm Mutual Insurance Company wrote Mr. Moldenhauer under date of March 31, 1947, as follows:

“ ‘Dear Mr. Moldenhauer:

“ ‘It is our desire to be relieved of liability for insurance on the above numbered policy.

“ ‘Policy No. 14791-NS-49 is being cancelled effective 12:01 a.m., Standard Time, April 6, 1947, and no further protection will be provided on your 1936 DeSoto four door sedan after that date.

“ ‘The \$11.99 returnable from this cancellation is being sent to your agent for his disposition.

“ ‘We regret that we are unable to be of service to you.

“ ‘Yours very truly,

“ ‘Underwriting Department.’ ”

(Tr. p. 23, ff. 41)

On April 4, 1947, Moldenhauer went to Allstate Insurance Company for insurance, although he knew that his policy had been cancelled effective April 6, 1947 and after receipt of the March 31, 1947 letter from State Farm Mutual. In the Transcript, page 24, ff. 42-44, it is stated:

“Q. Now, on April 4, 1947 you went to the Allstate Insurance Company for insurance, did you not? “A. The 4th, yea.

“Q. And at that time you knew that your policy had been cancelled effective April 6, 1947?

"A. Yeah.

"Q. And you went to the Allstate Insurance Company because you had received this letter from the State Farm Insurance Company?

"The Court: What is the date of the State Farm letter?

"Mr. Kluwin: The letter of March 31, 1947, which is Allstate's Exhibit 2.

"A. What was that?

"The Court: You may answer the question.

"(Whereupon the reporter read the pending question.)

"A. I had received a letter that I would be cancelled the 6th.

"Mr. Kluwin:

"Q. And it was your desire to get new insurance to go into effect on April 6th; is that correct?

"A. That is what I wanted, yeah.

"Q. So that in response to that letter you went to the Allstate to try to get insurance?

"A. I had figured on insuring with them before, but now I was compelled to get insurance. I didn't know of any other way of getting insurance, so I went there and I says, 'I'll be out of insurance April the 6th.'

"Q. If you hadn't received this letter from the State Farm Mutual, referred to as Exhibit 2, when would your insurance have expired; do you know?

"A. That I don't know for sure.

"Q. Some months later?

"A. I don't know for sure.

"Q. But in response to this letter you then went

to the Allstate's office in the Sears, Roebuck Store?

"A. That is why I went down there, yeah."

Mr. Moldenhauer, like Mr. Erickson in the instant case, falsely stated that his policy had not been cancelled, when in truth and in fact it had been, and he had received the cancellation letter. In the Transcript, pages 21 and 22, ff. 38 and 39, and pages 24 and 25, ff. 43-46, it is said:

"Mr. Kluwin:

"Q. Now, Mr. Moldenhauer, before you took out this policy with the Allstate Insurance Company, you were insured by the State Farm, were you not?

"A. I was what?

"Q. You were insured with the State Farm Insurance Company? "A. State Farm Mutual.

"Mr. Barly: Excuse me, John; he doesn't hear very well. Will you get fairly close to him?

"Mr. Kluwin: If I may stand here, if the court please.

"The Court: I think if you were closer, over there.

"Mr. Kluwin:

"Q. Now, Mr. Moldenhauer, do you have the policy that was issued by the State Farm Insurance Companies that was in effect just before you took out insurance of the Allstate?

"A. I haven't got it now any more.

"Q. As far as you know you destroyed that policy; is that correct? "A. Yeah.

"Q. In any event the policy that you had with them was cancelled, was it not?

"A. Not at the day I insured with Allstate.

"Mr. Kluwin: I move that that answer be stricken as not responsive.

"The Court: Well, what is 'cancellation'? Was there a failure of renewal in this case or was there an outright cancellation?

"Mr. Kluwin: There may be an issue here but I don't think there is any dispute about the fact that the policy was cancelled. Isn't that true, Mr. Barly?

"Mr. Barly: I have no proof of it. We can't find any letter that the company had written to him.

"Mr. Kluwin: May I ask this question, then, and renew the objection later, if the court please:

"Q. Did you ever receive a letter from the State Farm Insurance Companies advising you that they were cancelling the policy?

"A. They said they would cancel it the 6th.

"Q. You received such a letter?

"A. Yeah.

* * * * *

"Q. Now, on April 4, 1947 you went to the Allstate Insurance Company for insurance, did you not? "A. The 4th, yeah.

"Q. And at that time you knew that your policy had been cancelled effective April 6, 1947?

"A. Yeah.

"Q. And you went to the Allstate Insurance Company because you had received this letter from the State Farm Insurance Company?

"The Court: What is the date of the State Farm letter?

"Mr. Kluwin: The letter of March 31, 1947, which is Allstate's Exhibit 2.

"A. What was that?

"The Court: You may answer the question.

"(Whereupon the reporter read the pending question.)

"A. I had received a letter that I would be cancelled the 6th.

"Mr. Kluwin:

"Q. And it was your desire to get new insurance to go into effect on April 6th; is that correct?

"A. That is what I wanted, yeah.

"Q. So that in response to that letter you went to the Allstate to try to get insurance?

"A. I had figured on insuring with them before, but now I was compelled to get insurance. I didn't know of any other way of getting insurance, so I went there and I says, 'I'll be out of insurance April the 6th.'

"Q. If you hadn't received this letter from the State Farm Mutual, referred to as Exhibit 2, when would your insurance have expired; do you know?

"A. That I don't know for sure.

"Q. Some months later?

"A. I don't know for sure.

"Q. But in response to this letter you then went to the Allstate's office in the Sears Roebuck Store?

"A. That is why I went down there, yeah.

"Q. And did you see a man by the name of Mr. Mielke there? "A. Yeah.

"Q. And at that time did he take an application from you? "A. Yeah.

"Q. And did he ask you certain questions?

"A. The question was, have you been cancelled?

"Q. No. Did he ask you certain questions?

"A. Well, some questions, sure.

"Q. And you made certain answers?

"A. Yeah.

"Q. And was one of these—in one of these questions he asked you whether you had ever had any insurance cancelled, did he not?

"A. I said not as far as yet; that's my words.

"Q. Did you tell him that you had received the letter from the State Farm Mutual?

"A. He didn't inquire and I didn't answer him.

"Q. I say, did you tell him?

"A. No.

"Q. You didn't tell him that you received a letter that your policy was being cancelled effective April 6th, did you? "A. No.

"Q. And at that time you signed the application after it had been filled out; is that right?

"A. Yeah.

"Q. I show you what has been marked here as Allstate's Exhibit No. 4, and ask you if at the lower left-hand corner your signature, 'Max W. Moldenhauer,' appears? "A. If what?

"Q. If that is your signature?

"A. Yeah.

"Q. And that is the application that you signed?

"A. Yeah."

The memorandum decision of the District Court was as follows: (Tr. pgs. 43-44, ff. 110):

"United States District Court.

“* * * (Captions—4597-4612) * * *

“Memorandum Decision.

“(Endorsed: ‘Filed June 21, 1950. B. H. Westfahl, Clerk.’)

“Upon a careful consideration of the evidence submitted herein and of the arguments and briefs submitted by counsel, I have concluded that the defendant Allstate Insurance Company is entitled to a judgment declaring that the policy of automobile liability insurance issued to Max W. Moldenhauer was void by reason of his failure to disclose material facts, which failure to disclose increased the risk, and that the Allstate Insurance Company incurred no liability under said policy.

“The defendant Allstate Insurance Company is entitled to costs to be taxed by the Clerk of Court.

“Counsel for defendant Allstate Insurance Company will prepare findings of fact and conclusions of law and a form of judgment and present same for settlement on ten (10) days’ notice to counsel for the other parties.

“Dated, Milwaukee, Wisconsin, this 21st day of June, A. D. 1950.

“Robert E. Tehan,

“U. S. District Judge.”

The Findings of Fact and Conclusions of Law, based on the foregoing evidence, relates, in part, as follows (Tr. pgs. 45 and 46):

“* * * 6. That prior to the issuance of said policy of insurance the said Max W. Moldenhauer executed an application for insurance in which he de-

clared that no insurer had ever cancelled any automobile insurance which it had issued to him.

"7. That Allstate Insurance Company issued Policy No. M002734 based upon the express warranty made by the said Max W. Moldenhauer, which express warranty read as follows: 'Has any insurer ever cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household, to which question the said Max W. Moldenhauer answered "No."'

"8. That State Farm Mutual Insurance Company of Bloomington, Illinois, previous insurer of the said Max W. Moldenhauer, notified the said Max W. Moldenhauer on April 6, 1947, that it was cancelling his insurance, and that one, Mrs. Lehman, wife of the agent for State Farm Mutual Insurance Company, informed the said Max W. Moldenhauer that said policy of insurance was being cancelled because of the number of small accidents in which the said Max W. Moldenhauer had been involved."

The Conclusions of Law related in part as follows (Tr. p. 46):

"1. That the policy of automobile liability insurance No. M002734 issued April 6, 1947, by Allstate Insurance Company to Max W. Moldenhauer, and the subsequent renewal policy issued April 6, 1948, are null and void from the date of their original issuance because of the failure on the part of the said Max W. Moldenhauer to disclose material facts, which failure to so disclose increased the risk."

Judgment followed.

As heretofore stated, the complete transcript of these proceedings are available for the study of the Court and Counsel.

It is respectfully submitted the Court misconstrues the plain import of the letter of Mr. Cowden, Exhibit 2 in the instant case, which reads as follows:

“December 15, 1952

“Mr. O. F. Erickson and

“Mrs. Birdella A. Erickson

P. O. Box 812

Booneville, California

“Dear Mr. and Mrs. Erickson:

“Re: Cancellation of Policy No. 528848-B04-05

“It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy describing your 1951 Studebaker 4-Dr. Sed., motor number V19458.

“Policy No. 528848-B04-05 is being cancelled effective 12:01 a.m. Standard Time on the 27th day of December, 1952 and no further protection will be afforded after that date.

“Our draft in the amount of \$11.35 is being forwarded to our representative for disposition. This represents the unearned premium returnable from the cancellation of your policy.

“Very truly yours,

/s/ “G. M. Cowden,

Underwriting Superintendent”

There is no question that this letter extended coverage through December 27, but prior to the time

that Erickson applied to Allstate Insurance Company and signed the application, he knew that this policy had been Cancelled, and that he had been Refused further coverage. Regardless of the effective date of the cancellation, he had been cancelled and so advised. There was no other reason for him to seek insurance from Allstate Insurance Company other than to replace cancelled insurance. Therefore, to give effect to the continuance of coverage by State Farm Mutual Insurance Company until December 27 is to overlook entirely the fact that the policy had meanwhile been cancelled. To hold otherwise would be contrary to the findings of another United States District Court, whose decision has been affirmed by the United States Court of Appeals, for the Seventh Circuit.

All that State Farm Mutual Insurance Company did was to give notice of cancellation. The fact as the witness G. M. Cowden related, ten (10) days notice is required by the policy to terminate the effective period of the coverage does not vitiate the fact that there was an unequivocal present intention expressed to Erickson in the letter of December 15, which, of course, he received before he applied to Allstate Insurance Company.

As said in 29 Am. Jur. p. 263:

“* * * notice by the insurer to the insured need not be in any particular form in the absence of a statute or policy provision prescribing such form, and is sufficient so long as it positively and unequivocally indicates to the insured that it is the intention of the company that the policy shall cease

to be binding as such upon the expiration of the stipulated number of days from the time when its intention is made known to the insured."

In 14 Cal. Jur. p. 438 it is said:

"* * * under a policy requiring notice for a stated time it is only necessary positively to indicate the insurer's intention that the policy shall cease to be binding upon the expiration of the stipulated period after such intention is communicated, if such a notice expresses a present resort to the cancellation privilege to become effective at the time fixed."

In *American Glove Company vs. Pennsylvania Ins. Co.* 15 Cal. App. 77, the insurance company wrote on April 9, 1906 as follows:

"Gentlemen:—We desire to terminate our liability under Policy No. 170062 * * * The policy will be cancelled on our books on the 14th inst., five days from date * * *"

It is further stated in said case (page 80):

"Plaintiff in the same connection argues that the notice of April 9th was not a notice of cancellation, but merely of an intention to cancel, and therefore insufficient. But the notice expressed defendant's present 'desire to terminate liability.' The policy required 'five days' notice of such cancellation,' and for this reason the form of expression was adopted that the policy 'will be canceled on our books on the 14th inst., five days from date.' Moreover, the insured was asked to return the policy with the earned premium on that date. The meaning of this was in substance that the insurance company desiring then to cancel the policy and to terminate

its risk, thereby gave the insured the five days' notice prescribed by the policy, at the expiration of which the cancellation would become effective."

* * * * *

(Page 81) "It is clear that such cases are inapplicable to the case at bar. Here five days' notice of cancellation was required by the policy, and that notice was given. The notice did not express a mere intention of the defendant to thereafter avail himself of the cancellation privilege, but a present resort to it, which would become effective at the expiration of the prescribed period of notice."

* * * * *

(Page 82) "Even where the policy permits immediate cancellation upon notice, an unequivocal notice that the company will, on and after a certain future date, consider the policy canceled is held effective. The assured upon whom such a notice was served would be left in no doubt of the purposes of the company. He could not fail to understand that it was notice of the cancellation of the policy, to take effect on the day named in the notice."

There was no equivocal notice of cancellation by State Farm Mutual Insurance Company. Its letter was entitled "Cancellation of Policy", and Erickson was notified that he was being cancelled, effective date to be December 27. There is no ambiguity in the cancellation notice nor is there in the application of Allstate Insurance Company, which was the identical application in the Moldenhauer case as well. When Erickson, like Moldenhauer, received the State Farm Mutual letter of cancellation, and

informed the Allstate Insurance Company representative that he had not had a policy cancelled or refused, he was guilty of a misrepresentation and a material one, as the testimony of the defendant was uncontradicted that the policy would not and could not have been bound had a truthful answer been given to the inquiry set forth in the application.

Dated: December 8, 1954.

Respectfully submitted,

HEALY & WALCOM,
/s/ By LEO J. WALCOM,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 8, 1954.

[Title of District Court and Cause.]

ORDER

The Court having heard and considered the further evidence and authorities presented in the above entitled cause, it is hereby ordered that the motion of the defendant, Allstate Insurance Company, for an order setting aside the decision heretofore rendered in this action, is denied.

Dated: December 28, 1954.

/s/ O. D. HAMLIN,
United States District Judge

[Endorsed]: Filed December 28, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 14th day of October, 1954, and continued on the 15th day of October, 1954, before the court sitting without a jury, a jury having been expressly waived, Paul Friedman appearing as counsel for the Plaintiff, and Healy and Walcom appearing as counsel for the Defendant, and the court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the court for decision, and the court being fully advised in the premises now makes its findings of fact as follows:

Findings of Fact

1. That all of the allegations contained in paragraphs I and II of the complaint as filed herein are true;

2. That the amount in controversy in this action exceeds the sum of \$3,000.00, exclusive of costs and interest;

3. That this is a civil action, and that the Court has jurisdiction of this action based upon the existence of a controversy between citizens of different states in which the amount in controversy exceeds the sum of \$3,000.00 exclusive of costs and interest;

4. That all of the allegations contained in para-

graphs IV, V and VII of the complaint as filed herein are true;

5. That all of the allegations contained in paragraph VI of the complaint as filed herein are true, except that the total damages suffered by the plaintiff are in the sum of \$2,067.72;

6. That all of the allegations contained in paragraph I of the second, separate, distinct and further answer and defense to the complaint of plaintiff contained in the answer of defendant are true;

7. That a letter dated December 15, 1952, from the State Farm Mutual Automobile Insurance Company, with whom the plaintiff then had a policy of automobile insurance, was sent to the plaintiff and received by him before he made application to the defendant on December 17, 1952, for a policy of insurance, and that this said letter read as follows:

“Dear Mr. and Mrs. Erickson:

Re: Cancellation of Policy No. 528848-B04-05

It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy describing your 1951 Studebaker 4-Dr. Sed., motor number V19458.

Policy No. 528848-B04-05 is being cancelled effective 12:01 a.m. Standard Time on the 27th day of December, 1952 and no further protection will be afforded after that date.

Our draft in the amount of \$11.35 is being forwarded to our representative for disposition. This

represents the unearned premium returnable from the cancellation of your policy.

Very truly yours,

G. M. Cowden,
Underwriting Superintendent"

8. That the check for \$11.35 mentioned above in paragraph VII of the Findings of Fact was received and cashed by the plaintiff, Oscar F. Erickson, some time after the date of December 18, 1952;

9. That in issuing this said insurance policy to the plaintiff, the defendant did in fact materially rely on the representation made by the plaintiff in the policy and on the negative answer of the plaintiff to the question asked of him at the time of his application for the said insurance policy.

From the foregoing findings of fact the Court makes the following

Conclusions of Law

1. That plaintiff is entitled to judgment against the defendant in the sum of \$2,067.72 together with his costs and disbursements incurred and expended herein.

Let judgment be entered accordingly.

Dated this 6th day of January, 1955.

/s/ O. D. HAMLIN,
United States District Judge

[Endorsed]: Filed January 6, 1955.

In the District Court of the United States, Northern District of California, Southern Division

No. 33005

OSCAR F. ERICKSON, Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY, a corporation, Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 14th day of October, 1954, and continued on the 15th day of October, 1954, before the Court sitting without a jury, a jury having been expressly waived, Paul Friedman appearing as counsel for the plaintiff, and Healy and Walcom appearing as counsel for the defendant, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises and having duly made and filed its findings of fact and conclusions of law, and good cause now appearing:

It Is Hereby Ordered, Adjudged and Decreed:

1. That Plaintiff have judgment against the Defendant in the sum of \$2,067.72.
2. That Plaintiff have judgment against the Defendant for his costs and disbursements incurred and expended herein.

Dated this 6th day of January, 1955.

/s/ O. D. HAMLIN,

United States District Judge

[Endorsed]: Entered January 7, 1955.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the defendant Allstate Insurance Company, a corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain decree and judgment entered in the above entitled action on the 6th day of January, 1955.

Dated: January 28, 1955.

HEALY & WALCOM,

/s/ By JOHN J. HEALY,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 31, 1955.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Appellant Allstate Insurance Company, a corporation, designates the entire record proceedings and evidence to be contained in the record on appeal in this action, including the following:

1. Complaint on Insurance Policy.
2. Motion to Dismiss on Ground of Lack of Jurisdiction under Rule 12(b).
3. Notice of Motion to Dismiss on Ground of Lack of Jurisdiction under Rule 12(b).
4. Order Denying Motion to Dismiss.
5. Answer to Complaint.
6. The entire transcript of the proceedings, evidence, and testimony of all of the witnesses produced at the trial.
7. All exhibits offered by plaintiff and defendant and admitted in evidence at the trial.
8. Opinion of Judge O. D. Hamlin.
9. Notice of Motion for Order to Reopen Cause for Further Authorities and Evidence.
10. Points and Authorities in Support of Motion to Reopen Cause for Further Authorities and Evidence.
11. Order Denying Motion to Reopen Cause for Further Authorities and Evidence.
12. Findings of Fact and Conclusions of Law.
13. Judgment.
14. Notice of Appeal.
15. This Designation.

Dated: January 28, 1955.

HEALY & WALCOM,
/s/ JOHN J. HEALY,
Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed January 31, 1955.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL TO STAY EXECUTION

Whereas, the Defendant in the above entitled action, has appealed to the United States Court of Appeals for the Ninth Circuit, from a judgment made and entered against said defendant in said action, in the District Court of U. S. for the Northern District (Southern Division) in favor of the plaintiff in said action on the 6 day of January 1955 for Three Thousand and 00/100 Dollars (\$3,000.00), costs of suit, and

Whereas, the appellant is desirous of staying the execution of said judgment so appealed from,

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, American Motorists Insurance Company, a corporation organized and existing under the laws of the State of Illinois, and duly licensed for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the State of California, does hereby acknowledge itself justly bound in the sum of Three Thousand and 00/100 Dollars (\$3,000.00) being the amount named in the said judgment; that if the said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may

be awarded against the appellant upon the appeal; and that if the appellant does not make such payment within thirty (30) days after the filing of the remittitur from the judgment in the Court from which the appeal is taken, judgment may be entered in the said action on motion of respondent and without notice to the undersigned surety in their favor against the surety, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

In Witness Whereof, the said American Motorists Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact, and its Corporate Seal to be hereunto affixed at San Francisco, California, this 26 day of January 1955.

AMERICAN MOTORIST INSURANCE COMPANY,

[Seal] /s/ A. R. McCORD,
Attorney in Fact

Approved: February 1, 1955.

/s/ O. D. HAMLIN,
United States District Judge

Duly Verified.

[Endorsed]: Filed February 1, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO PREPARE TRANSCRIPT AND DOCKET CASE

Good Cause Appearing Therefor,

It Is Hereby Ordered that the Court Reporter of this Court may have to and including the first day of April, 1955, to transcribe and prepare the Record on Appeal as heretofore designated by Defendant Allstate Insurance Company, and to docket the same in the United States Court of Appeals for the Ninth Circuit.

Dated: March 10, 1955.

/s/ O. D. HAMLIN,

Judge of the District Court

[Endorsed]: Filed March 10, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this court, or true and correct copies of orders entered on the minutes of this Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the attorneys for appellant:

Complaint.

Notice of motion to dismiss with motion attached.

Minutes of December 7, 1953.

Notice of motion to dismiss with motion attached.

Minutes of July 12, 1954.

Answer to complaint.

Opinion.

Notice of motion for order to reopen cause for further authorities and evidence with points and authorities attached.

Order denying motion to reopen cause, etc.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Designation of record.

Cost bond on appeal.

Order extending time to docket appeal.

Plaintiff's exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10 and 11.

Defendant's exhibits A, C and D.

One volume of Reporter's transcript of trial.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this....day of March, 1955.

C. W. CALBREATH,
Clerk

In the United States District Court for the Northern District of California, Southern Division

No. 33005

OSCAR F. ERICKSON, Plaintiff,

vs.

ALLSTATE INSURANCE COMPANY,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Friday, October 15, 1954

Before: Hon. Oliver D. Hamlin, Judge.

Appearances: For the Plaintiff: Paul Friedman, Esq. For the Defendant: Healy and Walcom, by Leo J. Walcom, Esq., 68 Post St., San Francisco, California. [1*]

The Clerk: Erickson vs. Allstate Insurance Company.

Will respective counsel please state their appearance for the record?

Mr. Friedman: Paul Friedman, 531 Phelan Building, for the Plaintiff, Oscar Erickson.

Mr. Walcom: Healy and Walcom, by Leo Walcom, 68 Post Street, San Francisco, for the Defendant Allstate Insurance Company.

The Court: All right, gentlemen.

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

Mr. Friedman: Your Honor, may I make a brief opening statement?

Your Honor, this is an action by Oscar Erickson, who is seated in the courtroom here, to recover on a policy of automobile insurance that he had taken out with Allstate, the Defendant, on or about the 17th day of December, 1952. I will come to the damages in a moment.

The Defendant Allstate has refused to pay the damages alleged to have been suffered by Mr. Erickson and his wife, Mrs. Erickson, as a result of an accident which occurred on or about the 15th day of February, 1953, approximately three months later.

The Defendant bases the refusal to pay on the grounds that there has been a material misrepresentation on the part [3] of the Plaintiff, Mr. Erickson, to the Defendant's agent at the time of securing the insurance.

The representation alleged to be false by the Defendant is contained in the supplement page within the Allstate Insurance policy which was delivered to the Plaintiffs at the time they secured the insurance, and this clause upon which the Defendant seems to rely most strongly in refusing to pay the insurance is:

"During the past two years, with respect to the named insured"—that is, referring to Oscar Erickson—"or to any member of his household, no insurer has cancelled or refused any automobile insurance

nor has any license nor permit to drive an automobile been suspended, revoked, or refused."

The Defendant contends that inasmuch as at the time the Plaintiff Oscar Erickson appeared at the offices of the Defendant's agent in Santa Rosa, California, that at that time he had received a letter from another insurance company in which he was insured, informing him that on or about the 27th of December, his policy of insurance would be cancelled.

I have secured that letter, finally, tried to get it, finally have gotten it, and it reads as follows. It is dated December 15, 1952, addressed to Mr. Erickson. It says:

"Dear Mr. and Mrs. Erickson: [4]

"Re: Cancellation of policy No. 528848-B-04-05."

This is on the stationery of the State Farm Mutual Insurance Company with which company at that time Mr. Erickson had insurance of the same kind.

"It is with regret that we inform you of our desire to be relieved of liability for insurance under this policy describing your 1951 Studebaker 4-door sedan, Motor No. V-19458.

"Policy No. 528848-B-04-05 is being cancelled effective 12:01 a.m. Standard Time on the 27th day of December, 1952 and no further protection will be afforded after that date.

"Our draft in the amount of \$11.35 is being forwarded to our representative for disposition. This

represents the unearned premium returnable from the cancellation of your policy.

“Very truly yours, G. M. Cowden,

“Underwriting Superintendent.”

Now, the issue there in brief is very simple. Mr. Erickson contends, the Plaintiff, that this letter in and of itself which he received on or about the 15th or 16th of December did not at that time constitute a cancellation of his insurance, because it says it is with regret we are to be relieved of liability as of a certain date, to wit, the [5] 27th day of December.

Now, the Defendant says that constitutes in and of itself a cancellation of the policy so that when the Plaintiff states in his application to Allstate on or about the 17th of December, which is approximately ten days before the date set for cancellation, that he has never had a policy cancelled, that he was making a false representation. That is the Defendant's position. I submit to Your Honor that is the issue of the case pure and simple.

The Plaintiff contends that that does not constitute a cancellation. He is not bound to tell the Defendant that my company informed me that they will cancel me ten days hence, or 12 days hence, because that is what the Defendant wanted, and the Defendant itself has prepared its very voluminous document, two page contract, very carefully——

The Court: I take it you are getting into the argument now.

Mr. Friedman: I am, but I am saying that as the position of the Plaintiff, that that does not con-

stitute a false representation when they, in answer to that, "I have not"—just the answer "No" to the question: "During the past two years, with respect to the named insured or to any member of his household, no insurer has cancelled or refused any automobile insurance, nor has any license or permit to drive an automobile been suspended, revoked, or refused." [6] And the Plaintiff has answered "No." The Defendant says because you made that answer we will not pay.

Now, in reference to damages. Of course, we are all familiar, in order to stay in this Court, the Plaintiff in its complaint must allege damages above \$3,000. The Court has jurisdiction, we submit here, in a conflict between citizens of two different states, and the claim, as alleged in the Complaint is for more than \$3,000.

At this point, however, I have received further information this morning in addition to those answers to interrogatories previously made to the Defendant, and I would like to add to the list of damages already set forth in the interrogatories an additional \$700 in damages. The answers to the interrogatories listed in great detail damages totaling \$3,568.82. Among them were \$476.27 for medicals. Now, the Plaintiff desires to add to those interrogatories the statement, add \$700 to the medicals for nurse's services performed by a Mrs. Michaelson, registered nurse. That would increase the total damages claimed, which is set forth in the interrogatories, to the figure of \$4,268.82.

The Plaintiff also claims complete loss of a 1951

Studebaker automobile which was overturned in a wreck while the car was being driven by Mrs. Erickson on the 15th of February. The policy provides for—it is contended, and I don't think there is any argument about that—for payment [7] of the loss sustained to the automobile. There may be an argument as to the car allegation, as to the value of the car. Now, in the Complaint it was alleged the value of the car to be \$2,000. After conferring with the Plaintiff and also in reference to his deposition and answers to interrogatories, he has stated that the value of the car at the time of the wreck, in his opinion, was \$2300. So I desire to amend the Complaint to set that forth.

It is contended in the answers to the interrogatories as \$2300, but in the Complaint it is set forth as \$2000, so at this point I would like to have the Complaint conform to those answers to the interrogatories and state the value of the car as of the time the Plaintiff had this accident to be, in his opinion, \$2300.

There is no other amendment that the Plaintiff desires to make, but merely to state that when this accident occurred on the 15th of February, Mrs. Birdella Erickson, who was driving it, drove the car, through accidental means, upon the highway, it overturned two or three times, she suffered severe personal injuries and required a great deal of hospitalization and medical care. In fact, she was hospitalized, I believe, at least 30 days, February 15, I have here, to March 25, Redwood Coast Hospital

bill for her of \$231.50, and I have a bill for Mr. Erickson of \$21.25.

The car turned over approximately three times up in [8] Mendocino County going around the turn. Mrs. Erickson received very serious injuries, required hospitalization, required the care of nurses, was compelled to come down to San Francisco to Stanford Clinic, and I have bills for that, and accorded treatment there. In fact, she didn't have sufficient funds to receive all the treatment she needed. If she had, probably her medical bills would have run much higher. Also she was attended by two nurses, one is already listed here, I have a bill from Mrs.——

The Court: Well, counsel, get to the evidence. This is just an opening statement.

Mr. Friedman: I beg your pardon. I just want to summarize there are bills and there is evidence that the amounts of damages, at least claimed by this Plaintiff, are \$4,268.82.

I don't know what the answer of the Defendant will be as to how they will try to get around it, they may try to get around part of it, but I submit the Plaintiff is within the jurisdiction of the Court on the allegations of the Complaint.

Secondly, that the issue is really simple here, that is, there is no false representation made to the Defendant by the Plaintiff when the Plaintiff in answer to the Defendant's statement in the application form in writing that there has been no previous cancellation says "No", and I believe that [9] there is a proper foundation for the Court here to order

and require this Defendant to pay on its policy of insurance for which a premium has been paid.

Mr. Walcom: If the Court please, may I respond briefly?

If the Court pleases, this is an action on the insurance policy of Allstate Insurance Company, which Mr. Erickson sought on the 17th day of December, 1952.

The evidence will show that on that day he appeared at the agency of Allstate Insurance Company and requested the issuance of a policy. At that particular time he completed an application for the policy and in that policy application he was asked a question, has any insurer ever cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household.

Mr. Erickson answered "No."

The evidence will show that on the 15th day of December there had been mailed to him by his previous insurance carrier, the State Farm Mutual, the letter that counsel read to Your Honor, which said, we regret we are not going to carry you any longer, we are cancelling you effective the 27th of December. We are returning the unearned premium for the unexpired portion of the policy.

The evidence will show that upon receipt of that letter and upon receipt of his check returning the premium Mr. Erickson immediately went to Allstate Insurance Company [10] requesting coverage, and when he was asked the question about whether

he had been cancelled or any carrier refused to cover him further, he answered "No".

At the time that that application was issued, if the Court please, he was provided with binder coverage, that is, from the moment of the application he was granted insurance coverage. I may say that at the same time he told the agent that his policy with State Farm Insurance Company was expiring the next day, on December 18, and the evidence will show that on the application which then became a binder upon its acceptance and issuance there was provided a condition that any insurance bound hereunder shall otherwise be subject in all respects to the terms and conditions of the regular policy form of the company at present in use and to the statements in this application. If a policy is issued, it shall bear the effective date as provided on the face hereof.

Now, in due course, Mr. Erickson received this policy which, as counsel related, states that in reliance upon the declarations on the supplement page and subject to the limitation of liability, Allstate agrees.

Now, it agrees to cover the gentleman, provided, of course, that the representation that he made on his application and on that supplement page, it says: "During the past two years, with respect to the named insured, or to any member of his household, no insurer has cancelled or [11] refused any automobile insurance * * *". And in addition to that, on the policy there is a further provision: "Effect of policy acceptance: By acceptance of this policy

the named insured agrees that the declarations on the supplement page are his agreements and representations, and that this policy embodies all agreements, relating to this insurance, existing between himself and Allstate or any of its agents."

Now, the evidence will show, if the Court pleases, that at the time that Mr. Erickson made these representations that he had not been cancelled and not refused any further insurance, he had information --received that letter telling him his insurance was cancelled. It is true the effective date was on the 27th.

Then secondly, while Mrs. Erickson was driving the car that was involved in the collision, and that, of course, is a subject of the damage, the policy provided for collision insurance and also provided for medical payments coverage which counsel contends should be awarded here.

We, at the time of the filing of this suit, the evidence will show, made a **motion to dismiss** on the ground that there was no jurisdiction in this Court for this action. I may call your attention to that, I don't want to argue it, but we have denied jurisdiction. I call Your Honor's attention to the fact this law suit was filed many months, some eight or nine months after this accident occurred. At that time, in [12] a motion to dismiss, we stated that such time having elapsed the various bills were accumulated and could be set forth with particularity. Thereafter, that motion was denied and interrogatories were taken so that all along counsel has been aware of the effect in this law suit

of an inability to reach the \$3,000 jurisdiction involved. That is why we have denied that there is jurisdiction, and there is that issue.

We will, at the appropriate time, give Your Honor cases in the Federal Court and Federal Circuit governing this particular problem, one having to deal with the very company involved here, Allstate vs. Moldenhauer, 193 Fed. 2nd 66. That case involves not only the same Allstate Insurance Company, but the same warranty and the same State Farm Insurance Company, the same proviso on the part of the insurer.

The Court: What is the name of that?

Mr. Walcom: 193 Fed. 2nd 663, if the Court please.

The Court: 63?

Mr. Walcom: 663. Allstate Insurance Company vs. Moldenhauer.

The Court: All right.

Mr. Walcom: And I may say, if Your Honor pleases, that in the Moldenhauer case, when Mr. Moldenhauer applied to Allstate, just as did Mr. Erickson, he, at that time, had before him a notice from State Farm Mutual Insurance Company [13] that it was cancelling him as well.

Now, those are the issues. One is the jurisdictional amount, and second, the plain tenor of the letter Mr. Erickson received advising him that he was being cancelled.

The Court: All right.

Mr. Friedman: Your Honor, we may save some time if we can stipulate, Mr. Walcom, stipulate on the policy——

The Court: Swear the witness.

OSCAR F. ERICKSON

the Plaintiff, called on his own behalf, being first duly sworn, testified as follows:

The Court: State your name, please.

The Witness: Oscar Frederick Erickson.

Mr. Friedman: Mr. Walcom and I, Your Honor, have stipulated this is the policy Allstate issued on or about the 18th day of December, 1952, to the Plaintiff Oscar Erickson. I would like to offer it as an exhibit.

The Court: May be marked Plaintiff's Exhibit 1.

(The policy above referred to was received in evidence as Plaintiff's Exhibit 1.)

Mr. Friedman: And also Mr. Walcom is stipulating to admission into evidence of the letter of State Farm Insurance Company of the intention to cancel, dated the 15th day of December, 1952, and the covering letter dated September 15, 1954, in which this copy was sent to the Plaintiff by State [14] Farm Insurance Company. I would like to offer that as Plaintiff's Exhibit 2.

The Court: Exhibit 2.

(The letter of September 15, 1954 was received in evidence as Plaintiff's Exhibit No. 2.)

Mr. Friedman: I would also like to offer as Exhibit 3 the application that Mr. Erickson executed—it is a carbon copy of it—at the time he applied for the insurance, and I think that should be in evidence, and I offer it as Exhibit 3.

The Court: May be admitted.

(Testimony of Oscar F. Erickson.)

(The application was marked for identification Plaintiff's Exhibit 3 and received in evidence.)

Mr. Friedman: And Mr. Walcom, you will stipulate that Defendant is a corporation duly incorporated and organized under the laws of the State of Illinois as a citizen of such state, principal office and place of business in Chicago.

Mr. Walcom: That is admitted in the answer, if the Court pleases.

Mr. Friedman: All right.

Direct Examination

Mr. Friedman: Q. Now, Mr. Erickson, you secured this [15] policy of insurance with the Defendant Allstate Insurance Company, did you not, on or about the 18th day of December, 1952; is that right? A. That's right.

Q. Now, at that time, Mr. Erickson, you had received a letter, had you not, which is Plaintiff's Exhibit 2, from your then insurer State Farm Insurance Company; is that correct, Mr. Erickson?

A. Yes.

Q. Have you looked at that letter this morning?

A. Yes, sir.

Q. Now, that letter speaks of an intention to forward you an unearned premium, I think, of \$11.35? A. That's right.

Q. Did you receive that in the mail at that time?

A. No, sir.

Q. When did you get that money?

(Testimony of Oscar F. Erickson.)

A. It was approximately about two or three weeks later when— about two or three weeks later.

Q. Now, how was it you didn't receive it, it wasn't contained in the letter? A. No, sir.

Q. At that time. Now, for what period was that money refunded? Was that for the period within before December 27 or after December 27? [16]

A. After.

Q. Then you still, as far as you knew, were insured with State Farm until the 27th day of December, 1952? A. That's right.

Q. But nevertheless you went down to Allstate the day you received this letter and applied for insurance with that company?

A. That's right.

Q. And you made the answers contained in Plaintiff's Exhibit 3 to the agent, is that right?

A. That is right.

Q. Who filled out that form?

A. The agent at Santa Rosa. I don't remember, I don't recall.

Q. This all occurred in the Santa Rosa store of Sears Roebuck, is that it?

A. That's right.

Q. You don't know the name of the agent, but an agent there filled it out?

A. That is right.

Q. And you signed it?

A. That is right.

Q. Now, Mr. Erickson, did you and your wife— well, put it this way: Was your wife driving your

(Testimony of Oscar F. Erickson.)

automobile on or about the 17th or 15th day of February, 1953? A. That is correct. [17]

Q. What is her name?

A. Birdella Erickson.

Q. Is she here in court? A. Yes.

Q. This lady here (indicating)?

A. Yes.

Q. Now, what occurred at that time and where did it occur?

Mr. Walcom: Counsel, I will stipulate there was an accident causing damage to the car and causing injury to Mrs. Erickson.

Mr. Friedman: Very well. Anything else you would like to stipulate to before I move on with the testimony?

Mr. Walcom: I don't think that is an issue, never denied she was ever in an accident.

Mr. Friedman: Mr. Erickson, what happened to your car at that time?

A. Well, my wife was driving the car and was going around the turn. She stepped on the accelerator and it stuck in passing gear and she couldn't control it and turned over three times.

Q. What was the condition of your car after this accident?

A. Well, the agent—not the agent, but the man from Santa Rosa, from Allstate, Corippo, he called at the hospital—I have never seen the person, never talked to him——

Q. You can't testify if you never saw him. [18]

(Testimony of Oscar F. Erickson.)

The Court: Were you in the automobile at the time?

The Witness: Yes, sir.

The Court: You were in the car at the time?

The Witness: Yes, sir.

The Court: All right.

Mr. Friedman: Q. Will you tell us, please, your observation of what condition the car was in?

A. Well, the car was completely wrecked.

Q. All right. Now, what do you estimate the value of this car to be as of that date?

A. To my estimation, the car at that time—it was paid for and everything—was worth \$2300 to me, and I had taken it to Lou Fox before we went to Mexico.

The Court: We are trying to get along with a fan, and yet at the same time I think we better turn the fan off.

Mr. Friedman: Q. Take your time, please. I didn't get that answer. May I have it read?

(Record read by the reporter.)

The Witness: That's right.

Mr. Friedman: Q. Now, what kind of a car was that, Mr. Erickson?

A. It was a Studebaker, 1951.

Q. What model? A. 1951.

The Court: What particular model? [19]

The Witness: Oh, it was a Regal Deluxe.

The Court: Regal?

The Witness: Commander.

The Court: A sedan?

(Testimony of Oscar F. Erickson.)

The Witness: Yes, Commander.

Mr. Friedman: Q. As a matter of fact, Mr. Erickson, is this document I hold in my hand, which I am about to show you, a copy of your purchase order of this car when you bought it, and does it represent the price you paid for the car?

A. That's right.

Q. Look at it, please? A. Yes, sir.

Q. And the price indicated is a total of \$2,-794.71, is that correct, Mr. Erickson?

A. That is right.

Q. Purchased on March 23, 1951?

A. That's right.

Q. Was that purchased new?

A. Yes, sir.

Mr. Friedman: I would like to offer this in evidence, Your Honor, as proof or corroboration of proof of the value of the car.

The Court: All right. May be marked Exhibit 4.

(The purchase order was marked and received [20] in evidence as Plaintiff's Exhibit 4.)

Mr. Friedman: Now, were you injured or your wife injured in this accident?

A. We both were.

Q. Now, what happened to you, what happened to your wife? A. My wife—

Mr. Walcom: Just a moment. I object to this as calling for the conclusion of the witness, if the Court please. That should be subject of medical testimony.

(Testimony of Oscar F. Erickson.)

The Court: I don't think it yet calls for a conclusion; she went to a hospital.

Mr. Walcom: Very well, I will withdraw the objection.

Mr. Friedman: Q. What happened, Mr. Erickson, if you can tell us?

A. Well, she had several concussions of the brain.

The Court: Was she taken to a hospital?

The Witness: Yes, sir.

The Court: Where?

The Witness: At Ft. Bragg, California.

The Court: That was immediately after the accident, was it?

The Witness: That's right.

The Court: And how long did she remain in that hospital?

The Witness: Fifteen days.

Mr. Friedman: Q. Mr. Erickson, have you ever received [21] a bill from the hospital?

A. Yes, sir.

Q. Both for yourself and your wife?

A. Yes, sir.

Q. Did you go to the hospital, too?

A. Yes, sir.

The Court: Was there anyone else in the car but you and Mrs. Erickson?

The Witness: No, sir.

Mr. Friedman: Q. Are these the bills, Mr. Erickson, you received from the hospital?

A. Yes, sir.

(Testimony of Oscar F. Erickson.)

Mr. Friedman: I would like to offer these in evidence, Your Honor.

The Court: May be marked Exhibit 5.

(Hospital bills marked Plaintiff's Exhibit No. 5 and received in evidence.)

Mr. Friedman: Q. Did you wife secure any additional medical treatment, other than this hospitalization after this accident?

A. Yes, sir.

Q. Where and what?

A. Stanford-Lane Hospital, San Francisco.

Q. Do you know what was done for her there?

A. Well, it was taking care of the injury on her forehead. [22]

Q. Did you receive any further medical care?

A. No, sir.

Q. Mr. Erickson, can you tell us what happened to your car in reference to the Defendant Allstate and its conduct of this matter immediately after the accident?

A. Well, the car was towed in to the garage at Burke's Motor Company and in Ft. Bragg, and it was there for about four or five days, and then I went down to see it and it was gone. I never have any recollection of the car being moved.

Q. Anyone tell you they were moving it from there?

A. Nobody told me anything.

Q. Did you find out where it was taken?

A. Yes, I talked to Mr. Burke at the Ford Motor Company and he told me——

(Testimony of Oscar F. Erickson.)

Q. Speak into the microphone.

A. Repeat that over?

Q. Yes, please.

A. Mr. Burke at the Ford Motor Company told me at that time that it was taken to Ansel Schloss in San Francisco.

Q. You hadn't ordered that done?

A. I had never, no.

Q. Did you subsequent to that call the Ansel Schloss, call Ansel Schloss and ask him what he was doing with the car? A. Yes, sir.

Q. About how long after that was it? [23]

A. About a week.

Q. Can you tell us the conversation?

Mr. Walcom: Just a moment.

Mr. Friedman: Withdraw it.

Q. Did you ever get your car back?

A. No, sir.

Q. Were you told at that time that the Allstate wasn't going to take care of paying the medical bills and property damage and so on?

Mr. Walcom: Just a moment. If the Court please, I will object to that, calling for hearsay unless he was told by some of the Defendants.

The Court: Objection sustained.

Mr. Friedman: Q. Did any representative of Allstate Insurance Company at that time advise you in any way that you were not—I am speaking immediately after the accident—that you were not to be, that your policy wasn't to be honored?

A. Not right at that time, no, sir.

(Testimony of Oscar F. Erickson.)

Q. As a matter of fact, all the information was to the contrary? A. That's right.

Mr. Walcom: Now, just a moment.

Mr. Friedman: All right.

Q. Mr. Erickson, I am showing you a letter dated March 3, [24] 1953 on the stationery of the Allstate Insurance Company, and ask you whether you received this letter? A. Yes, sir.

Q. Did you receive this letter?

A. Yes, sir.

Mr. Friedman: I offer this letter in evidence, Your Honor, as indicative of the state of mind of the Defendant at that time.

Mr. Walcom: I will object to it as indicating the frame of mind of the Defendant. In any event, the letter speaks for itself.

Mr. Friedman: Anyway, the Court wants to look at it.

The Court: Give it 6.

(The letter dated March 3, 1953, was marked Plaintiff's Exhibit 6 and received in evidence.)

Mr. Friedman: Q. Now, Mr. Erickson, I am going to show you a letter dated March 4, 1953, from Allstate Insurance Company, and a letter dated March 24, 1953, Allstate Insurance Company——

Mr. Friedman: Have you an erasure, please? I just want to remove some pencil marking on the letter——

Mr. Friedman: Q. (Continuing) ——and I will

(Testimony of Oscar F. Erickson.)

ask you whether you received those letters from the Allstate Insurance Company?

Mr. Walcom: I will stipulate he did, counsel.

Mr. Friedman: Let him look at them, anyway.

The Witness: Yes, sir.

Mr. Friedman: Counsel has also stipulated. I offer these exhibits as Plaintiff's exhibits next in order, Your Honor.

The Court: Let the March 4 letter be marked Exhibit 7, and the letter dated March 24 as Exhibit 8.

(The letters dated March 4, 1953 and March 24, 1953, were marked Plaintiff's Exhibits Nos. 7 and 8 respectively and received in evidence.)

Mr. Friedman: Q. And then, Mr. Erickson, I will show you a letter dated April 13, 1953 on the stationery of Allstate Insurance Company together with an attached copy of a letter previously sent to you, and will ask you whether you received that letter together with the attached copy on or about the 14th or 15th of April, 1953?

Mr. Walcom: May I see that, counsel? This is addressed to you.

Mr. Friedman: Oh, I beg your pardon; I beg your pardon. I think we already have the 24th letter in there.

Mr. Friedman: Q. Mr. Erickson, on or about the 25th or 26th of March, 1953, was the first indication, was it not, that the Defendant, Allstate, was not going, would not honor their policy? [26]

A. That's right.

(Testimony of Oscar F. Erickson.)

Q. You hadn't received previous information to that effect before? A. That's right.

Q. That is approximately—well, the Court can compute that, approximately 19 days after the accident? A. That's right.

Q. Now, Mr. Erickson, did you receive the document I am about to show you, registered mail, from Ansel Schloss on or about the 12th day of December, 1953? A. Yes, sir.

Mr. Friedman: I offer this document in evidence, Your Honor, as the exhibit next in order.

Mr. Walcom: I think it is wholly incompetent, irrelevant and immaterial, if the Court pleases.

The Court: Is it a letter?

Mr. Walcom: It is notice of sale of car for non-payment of the repair bill.

Mr. Friedman: It is notice of intention to sell the automobile owned by Mr. Erickson by Ansel Schloss for non-payment of repair bill, and I feel it is material in this case because his testimony will show that apparently the car was sold and that would involve a total loss of his car plus a deficiency on his bill for non-payment, and for that reason it is being offered to show damage suffered by Mr. Erickson [27] as the result of Allstate's failure and refusal to honor their contract.

Mr. Walcom: If the Court please, there would be no probative value in a legal notice. I am sure that Plaintiff could bring in someone from Ansel Schloss to show whether or not there is any de-

(Testimony of Oscar F. Erickson.)

ficiency or what the bill was. It is only a notice or copy of a publication in the recorder.

Mr. Friedman: It speaks for itself.

The Court: It is notice of sale?

Mr. Friedman: Intention to sell, Your Honor.

The Court: Intention.

Mr. Friedman: For an unpaid repaid bill of \$1117, and they say that they will sell the automobile, Wednesday, 6 January 1954, at 12:00 a.m. at 49 South Van Ness Avenue in the City and County of San Francisco, State of California, to satisfy a lien against said automobile in the sum of \$1,117.55.

I think that is very material.

Mr. Walcom: It is of no probative value, no sale, those are all matters of proof. It is harmless in itself, but of no probative value as to value or anything else, if the Court please.

The Court: I am inclined to think the objection to it should be sustained, particularly a notice of sale. I will mark it for identification, however: give it 9 for identification. [28]

(Notice of intent to sell was marked Plaintiff's Exhibit 9 for identification.)

Mr. Friedman: Q. Mr. Erickson, did you ever receive any other notice of any other kind from Mr. Schloss? A. No, sir.

Q. Never heard from him again, did you?

A. No, sir.

The Court: Did you go down there?

The Witness: No, sir.

(Testimony of Oscar F. Erickson.)

Mr. Friedman: Q. This was subsequent, was it not, to the declination of the Defendant to honor the policy? This came later, did it not?

A. Yes, sir, that is right.

Q. This notice, many months later?

A. That's right.

Q. And your car had been taken down to Ansel Schloss without——

A. That's right.

Q. ——without your authorization?

A. That is right.

Q. By a representative of Allstate?

A. That's right.

Q. The car had been towed to a Ft. Bragg garage?

A. Yes, sir. [29]

Q. As far as you knew or were concerned, is that right?

A. That's right.

Q. The next you knew, it was taken down to Ansel Schloss?

A. That is correct.

Q. The next thing you heard about it as far as its ultimate disposition was they were going to sell it for these repairs?

A. That's right.

Q. As a matter of fact, your information was the car wasn't repairable, was that true?

A. That's true.

Mr. Walcom: Just a moment. I will object to what his information was. Hearsay.

Mr. Friedman: Withdraw it.

Q. The car, when you saw it, was a total wreck, is that right?

A. That's correct.

Q. Do you know if that car was sold by Ansel Schloss?

A. Sir?

(Testimony of Oscar F. Erickson.)

Q. Do you know if the car was sold by Ansel Schloss? A. As far as I know, yes.

Q. Do you know what price they got for it?

A. I think it was around \$600 and something.

Q. Now, Mr. Erickson, when you took this car, or rather, you took the insurance from Allstate on or about the 17th of December, 1952, was there any conversation between you [30] and the agent with reference to the use of a car in the event of a wreck? A. Yes, sir.

Q. What was that conversation?

A. At the time, he told me that if I had a wreck and I couldn't use my own car that I had, that I could have a car or borrow a car, that they would furnish me transportation.

Q. Now, after this wreck, did you request from any agent or representative of Allstate the use of a car?

A. I called the Allstate agent at Santa Rosa and he said definitely no.

Q. Then what did you do with reference to the use of a car?

A. I had to call my nephew at Booneville, which was 48 miles, to come and get me.

Q. Where were you at that time?

A. In Ft. Bragg.

Q. And then did you use his car or any car as the result of this accident?

A. I used his car.

Mr. Walcom: Just a moment. I am going to make an objection to that line of testimony, if the Court

(Testimony of Oscar F. Erickson.)

please. There is no provision whatever in this policy for any loan of a car or car rental under collision, and I don't think there is in any policy. [31]

The Court: Is that in the policy?

Mr. Walcom: No, Your Honor.

Mr. Friedman: Your Honor, I would say that Mr. Walcom may have a point there. It would be a matter of interpretation. There are a couple of spots in the policy that might be elastic enough. They wrote the policy.

Mr. Walcom: Here is a copy. Would you show us any place where there is any place about car rental?

Mr. Friedman: Now, on page 1—it may not apply—I am saying it could be elastic enough; under 5 it says:

“Coverage J—towing and labor insurance. To pay costs for labor done at the place of disablement and for towing, made necessary by the disablement of the owned automobile or a substitute automobile.”

That might be interpreted, if he were driving a substitute automobile, this man could believe that he was entitled to a substitute automobile.

Then, on page 2 where it says “Definitions”, under Definition 10, where it says:

“‘Loss’, wherever used with respect to coverages D and H means each direct and accidental loss of or damage to the automobile.”

Coverage D, I think, is the collision and H is comprehensive; it may be in reverse, but it is those phrases. [32]

(Testimony of Oscar F. Erickson.)

Now, of course, there is a loss of his automobile, I will admit that. We are expanding, possibly, but it isn't beyond the realm of interpretation and we did have the rule that since the Defendant Allstate Insurance Company has written this policy that if there is any ambiguity in it or in its interpretation that it would be just and equitable that it be interpreted against them.

Now, I have an item of damage listed in the answers that loss of use of car for 30 days. Now, I also understand that one of the arguments by Defendants, they are contending in the limits of liability on page 4 in the last paragraph where it says the limit for liability is the actual cash value of the automobile, or if the loss is of a part,—I understand they are relying on that.

I say, if we apply the rule of interpretation and take the phrase on page 1 and the damage total and labor and take the definition of loss, I would say it would not be beyond the realm of fair interpretation to interpret this policy to mean that if he suffers an accidental loss, the loss of or damage to the automobile, that he is entitled to recover for that loss.

Now, the testimony here attempted to be elicited is the loss of use of this car as a result of the accident. I say that this subdivision 10 does not by its definition completely exonerate this company if this man is able to [33] prove to the Court that he has a right to claim under the policy nor, as I say, maybe that right or very possibly that right should

(Testimony of Oscar F. Erickson.)

extend to the accidental loss of use, because it is accidental loss of his car.

Mr. Walcom: If the Court please, I am rather bewildered by counsel's exposition of what this policy is, but it is very plain. Coverage J, you will see, is the towing and labor, to pay cost for labor done at the place of disablement and for towing made necessary by the disablement of the owned automobile or a substitute automobile. But there is no substitute automobile involved here. It is very readily defined on page 2 what is a substitute automobile. It says an auto not owned by the insured, but temporarily used as a substitute when his own automobile is laid up or something. That doesn't come into the picture at all, and the loss referred to in Coverage D means accidental loss or damage to the car. There is no evidence whatsoever, any verbiage any place in this policy where the company will pay him for a car, loan him a car, nor can counsel find any insurance policy that says that as far as collision is concerned. Any rental permitted is where you have a theft case, and that is described in paragraph 9 of the policy. There isn't anything in this policy that would provide for loss of use that counsel is asking under the policy. Just nothing whatsoever in there that covers that issue.

Can I assist Your Honor in any way? I think it is so clear.

Mr. Friedman: It may be clear to Allstate, but it may not be clear to the purchaser of the insurance, and if Allstate has carefully devised this con-

(Testimony of Oscar F. Erickson.)

tract and it is subject to an interpretation, I submit they are bound by any ambiguity that they themselves have created in the writing.

The Court: What is called Coverage B, Mr. Walcom?

Mr. Walcom: Coverage B, Your Honor, is property damage. In other words, Coverage A is liability or bodily injury, to pay for personal injuries or death or the like.

B is for injury to or destruction of property, as Your Honor will see in the insuring agreement, No. 1.

Now, that, of course, is for third parties. In other words, this is an indemnity, that provision is an indemnity that protects the Defendant against the claims of someone else for injury to his person or to his property.

Mr. Friedman: Now, the only coverage we are concerned with here, if I may assist Your Honor, is what we call first party coverage.

Mr. Walcom: That is to say, that covers just medical payments.

The Court: I call your attention to subdivision 6 of 10, where the words "loss of use" is used, you contend that [35] refers to property damage?

Mr. Walcom: Yes, Your Honor, covers whenever used with respect to coverage A, that is personal injury, bodily injury liability, includes coverage for care and loss of services and with regard to Coverage B, damages for loss of use.

The Court: If somebody else——

(Testimony of Oscar F. Erickson.)

Mr. Walcom: For someone else, it will indemnify. That is third party coverage, but there is no provision that follows One having his own personal property damaged and being laid up.

The Court: I do not see anything in there, counsel, as yet, which would cover the loss of use by the Plaintiff here.

Mr. Friedman: Well, Your Honor, I have submitted the argument about interpretation. I realize that the policy has to be interpreted to place that construction on it, and the argument is based upon the fact and basis that they have created some ambiguity and are responsible for the ambiguity.

The Court: Well, I think that is the general principle that the policy must be construed most strongly against the insurance company, but I still don't think it goes so far as to cover any loss of use.

Mr. Friedman: Very well, Your Honor. I have an exception on the record. [36]

Mr. Friedman: Q. Mr. Erickson, what were the total amount of bills, including this morning's amendment of \$700 for nurses, for medicals, such as drugs and so on?

Mr. Walcom: Just a moment, I will object to that. I haven't seen any proof of any bills other than those presented here.

Mr. Friedman: All right.

Now, Your Honor, in reference to bills, I make the statement now we can present bills for all the damages. I am going to have to rely for some of

(Testimony of Oscar F. Erickson.)

them on the testimony of the parties involved, and I believe that is admissible evidence.

The Court: Well, let's go as far as we can with what you have.

Mr. Walcom: I will stipulate to that.

Mr. Friedman: What is the amount?

Mr. Walcom: \$72.50 is what I got.

Mr. Friedman: I believe I had \$82.87, whatever bill counsel stipulated to——

Mr. Walcom: \$72.50, that is my——

The Court: Well, let's take a recess and you can add them up. (Short recess.)

Mr. Friedman: Your Honor, counsel was right. There is a discrepancy of about \$7, and our bills total \$74.97, is [37] that right?

Mr. Walcom: Yes.

Mr. Friedman: I would like to submit these additional bills.

The Court: These are bills. May I see them? They are for what?

Mr. Friedman: These bills, Your Honor, are for clinical treatment at Stanford, for some drugs up there, and miscellaneous items of care.

The Court: That is for treatment and for drugs down here, and also up in the other——

Mr. Friedman: I believe all down here.

The Court: All down here. All right. They total what?

Mr. Friedman: They total \$74.97.

The Court: That is for the treatment of Mrs. Erickson?

(Testimony of Oscar F. Erickson.)

Mr. Friedman: For the treatment of Mrs. Erickson.

The Court: They may be marked as one exhibit, Exhibit 10.

(The bills above referred to were marked Plaintiff's Exhibit No. 10 in evidence.)

Mr. Friedman: Q. Mr. Erickson, how was your wife removed from the scene of the accident?

A. By a car.

Q. Whose car?

A. Friend by the name of John Hansen. He lives in Albion. [38]

Q. Where was she taken?

A. To the Redwood Coast Hospital.

Q. Now, in answer to interrogatory No. 15, cost of removal from scene of accident to Redwood Coast Hospital for Birdella Erickson, \$15. What was that for?

A. To pay the man to take us over there.

Q. Was that actually paid?

A. Yes, sir, I paid that to this man.

Mr. Walcom: What is that name again?

The Witness: John Hansen.

The Court: \$15?

The Witness: Yes, sir.

Mr. Friedman: Yes, Your Honor.

I have no other questions of this man at this time, Your Honor.

Cross Examination

Mr. Walcom: Q. Mr. Erickson, do you have the policy with the State Farm Insurance Company

(Testimony of Oscar F. Erickson.)

that was in force prior to the time that you went to Santa Rosa and requested coverage with Allstate Insurance Company? A. Yes, sir.

Q. May I see it, please?

Mr. Friedman: I don't know whether this is the one. It may be the previous one, but I think they are probably about the same, probably be a renewal of the same policy. [39]

Mr. Walcom: We will pass it. We will present a policy subsequently.

Mr. Walcom: Q. Mr. Erickson, in any event there came a time in December of 1951 when you received that letter which has been marked as your exhibit——

Mr. Friedman: 1952.

Mr. Walcom: I am sorry, 1952.

Q. (Continuing): ——from the State Farm advising you that they regretted their inability to continue covering you, cancelling you effective the 27th of December, 1952, did you not?

A. That's right.

Q. Now, calling your attention to your previous experience with the State Farm, you had had about eight losses on your car immediately prior to that particular date, had you not?

Mr. Friedman: Your Honor, I am going to object to any questioning along that line. The action is based upon a policy of insurance, the declination to pay is based upon an answer to a written representation contained in the body of the application and again in the policy that is issued, and I submit

(Testimony of Oscar F. Erickson.)

that no parol evidence can be used here to vary the terms of this policy, and that if we wander into other fields this trial would be prolonged days, and I don't think counsel should be permitted to examine into anything but the question of whether or not his answer of "No" [40] constituted a breach of the representation contained in that policy.

The Court: Counsel, does it really make any difference whether the prior company, the State Farm, was or was not correct in its position that they were going to cancel, or the reasons?

Mr. Friedman: No.

Mr. Walcom: My only position is more or less preliminary. I merely want to show at the time this gentleman went to Allstate he knew he was being cancelled and the reasons for it.

Mr. Friedman: The only point, Your Honor, is there a breach of any representation and the representation is, have you ever been cancelled, and that is the issue.

The Court: Well, I think if it is just merely a preliminary question to show that he knows that there is a reason for that, I will permit that answer for that purpose.

Mr. Walcom: Q. You had had about eight losses from 1948 to 1952, had you not, collision losses, to your car? A. Not that many.

Q. You had several, in any event, did you not?

A. Well, personally I never had any, but I am the father, so I will take the blame.

Q. Let us take the last one immediately prior to

(Testimony of Oscar F. Erickson.)

the cancellation letter, that was when an intoxicated person was [41] driving your car, isn't that true? A. That's right.

Q. And then came that letter advising you they were no longer going to carry you, isn't that true?

A. That is right.

Q. And that letter is dated December 15 of 1952?

A. Yes.

Q. You received that the following day, Mr. Erickson?

A. Will you repeat that question?

Q. Could you tell us on what day you received that letter of State Farm advising you that they were going to cancel you? On what date did you receive it?

A. I think on the 15th or 17th, or in between that.

Q. In any event, immediately upon the receipt of that letter, you then went down to Santa Rosa to Allstate Insurance Company?

A. That is correct.

Q. Yes. And it is true, is it not, that you were asked first of all whether or not any insurance company had cancelled you within two years preceding your application and/or whether any insurance company had refused you coverage; you were asked that question? A. That's right.

Q. And at that time you said "No", didn't you?

A. That's right. [42]

Q. And you received that document, which is in evidence, that is, that application which bears upon

(Testimony of Oscar F. Erickson.)

the reverse of it the binder provisions, did you not? You received a copy of that application which you signed on the reverse of it, the provisions there, No. 5 particularly, relating to the terms and conditions of coverage, did you not? A. That's right.

Q. Yes. And all the time that you talked with the agent, Mr. Erickson, you knew in your mind that you had received a letter from the State Farm telling you that they refused to give you coverage and that they were cancelling you effective December 27, didn't you?

Mr. Friedman: Your Honor, I am going to object to that question. The letter is in evidence; the letter speaks for itself. The policy is in writing. I think all of this is very far afield. The company has prepared its representations, the exact language of the representation itself, has control of the document, has submitted it to this man, he has accepted it, and in respect to a particular question that the company, if the company had wanted to say, have you received a letter, put it in there, in which you will be cancelled, it could protect itself. The query is have you ever been cancelled, and I believe cancellation, as Your Honor probably knows, is not a—

The Court: You are arguing something? [43]

Mr. Friedman: I object to the question.

Mr. Walcom: Your Honor, at an appropriate time we will be introducing some sections of the insurance code of this state and I want to get the facts to conform to it.

(Testimony of Oscar F. Erickson.)

The Court: Mr. Erickson, did you receive any other communication of any kind from the State Farm in reference to cancellation, other than this letter dated December 15?

The Witness: No, sir.

The Court: No oral communications or written communications other than this?

The Witness: That is right.

The Court: This December 15 letter, I think that speaks for itself.

Mr. Walcom: Q. Then let me ask you this, Mr. Erickson: When you got that letter you went to see Mr. Higgins, the State Farm agent, did you not?

A. I am sorry, I did not.

Q. Yes, and when you saw Mr. Higgins he told you you were being cancelled because——

The Court: He said he did not, Mr. Walcom.

The Witness: I am sorry.

Mr. Walcom: I am sorry, sir.

At this time, if the Court please, I would like to ask [44] leave to file the deposition of the plaintiff, Mr. Erickson, and ask that it be marked and like to refer to it, if the Court pleases.

Mr. Friedman: Your Honor, I don't know what section of the deposition counsel is going to refer to, but if he is going to refer to any conversation by and between Mr. Higgins and Mr. Erickson, I submit it is inadmissible under the issues of this case, regardless of what that conversation was.

The Court: Well, the deposition of a party is always admissible, counsel.

(Testimony of Oscar F. Erickson.)

Mr. Friedman: Yes, but subject to my objection.

The Court: Some particular objection to a conversation, we can handle that. It may be marked.

Mr. Walcom: Q. Now, you did talk to him on the telephone, that is, Mr. Higgins?

Mr. Friedman: Your Honor, I am going to object to any questions with reference to conversations between Mr. Erickson and Mr. Higgins. The policy is there, the letter is there, and that is the issue of the case.

Mr. Walcom: If the Court please, this is cross examination, if for no other purpose it would certainly be admissible as impeachment, because we have the man's deposition and there relates his telephone conversation with Mr. Higgins. That is what I want to examine him about right [45] now.

The Court: As to what, Mr. Walcom? When is this conversation?

Mr. Walcom: This conversation, on or about the 15th day of December, 1952, with Mr. Higgins, he telephoned him——

The Court: Who is Mr. Higgins?

Mr. Walcom: He was the State Farm agent.

The Court: Would he have any authority to take any action on his policy?

Mr. Walcom: Other than to return the premium, which that letter indicates, the premium check was forwarded to his agent.

The Court: You contend that the premium check did accompany the letter of December 15?

Mr. Walcom: Oh, no. The letter says, says we

(Testimony of Oscar F. Erickson.)

are returning the premium check through your agent, Mr. Higgins.

Mr. Friedman: I don't recall——

Mr. Walcom: Well, your agent——

Mr. Friedman: Doesn't say Higgins.

The Witness: No.

The Court: Forwarded to our representative for disposition.

Mr. Walcom: Yes.

Mr. Friedman: Could have been anybody.

The Court: You contend the premium had been returned prior to the 17th? [46]

Mr. Walcom: Your Honor, I don't think it makes any—I am not concerned when the premium was returned.

The Court: Why go into that?

Mr. Walcom: Only going into that to show Mr. Erickson talked with Mr. Higgins and was informed because of his bad accident record he would be cancelled.

Mr. Friedman: Your Honor, I don't think that is proper because it opens the door to many things, conversations, other conversations, possibly between Mr. Higgins and Mr. Erickson, whether Mr. Higgins is authorized to tell Mr. Erickson why the company is doing it, whether he knew himself, and so on. I don't think that is proper.

Mr. Walcom: Only from the lips of Mr. Erickson himself. He admits in his deposition he was told by his agent, Mr. Higgins, that it was on account of the wrecks.

(Testimony of Oscar F. Erickson.)

Mr. Friedman: Your Honor, that is on deposition. We are on trial here now, and I wasn't even present. In fact, an associate of mine was there. I would have objected if I were, and I have a right to object now.

The Court: Well, frame your question, counsel, and you can make the objection.

Mr. Walcom: Q. Mr. Erickson, can you tell me whether or not on the 15th day of December, 1952, you called Mr. Higgins?

Mr. Friedman: I object again. [47]

The Court: That is preliminary. The objection to that may be overruled.

A. I did not. Any statement in there regarding that, that is not true, because my wife went to the Eastern Star that night and talked to Mr. Higgins herself.

Mr. Walcom: Q. All right, let me call your attention to your deposition on page 26, line 8.

Mr. Friedman: Your Honor, the witness has indicated additions, if he made such a statement, to correct it at this time.

Mr. Walcom: Q. Page 26 and continuing on to 27——

Mr. Friedman: The whole page?

Mr. Walcom: Starting at line 8.

Mr. Friedman: Well, it is the same objection, of course, goes into the conversation with Higgins, whether Higgins has authority, and heavens knows.

The Court: That is another matter, whether he had authority.

(Testimony of Oscar F. Erickson.)

Mr. Walcom: Only concerned with his knowledge.

The Court: Yes.

Mr. Walcom: Q. I will ask you, do you recall, Mr. Erickson, that on the 13th of September, 1954, your deposition was taken in my office, you were then accompanied by Mr. Tashjian, your counsel's associate? A. Right. [48]

Q. I will ask you whether or not these questions were asked you and whether you gave these answers.

First, read it to yourself, and then I will ask you the question.

Mr. Friedman: Now, Your Honor, I gather——

The Court: He has a right to ask the question, counsel. Get the question in the record.

Mr. Friedman: But I gather he is trying to impeach his testimony that he had a conversation.

The Court: That's right.

Mr. Friedman: Now, that's the first question.

Mr. Walcom: Q. Will you please read, Mr. Erickson, from line 8 on page 26 down to line 17 on page 27? Just read that to yourself, sir.

(Witness reading.)

Mr. Walcom: Thank you, sir.

Q. Now, Mr. Erickson, on the 13th of September when your deposition was taken, will you please tell us whether these questions were propounded to you and these answers given:

“Q. Now, when you got that letter from State Farm, which was dated on or about the 15th day

(Testimony of Oscar F. Erickson.)

of December of 1952, Mr. Erickson, did you then go to Mr. Higgins?

"A. No, we called him.

"Q. You called him. And at that time did [49] he not tell you that State Farm would not insure you further? "A. No, he did not.

"Q. Did he tell you to go place your coverage with some other company? "A. Yes, sir.

"Q. And then you did? "A. Yes, sir.

"Q. And when he told you to place it with some other company, did he tell you anything at all about why State Farm had written you that letter?

"A. Well, on account of the wrecks I had.

"Q. Yes?

"A. Not me, but I had the wrecks.

"Q. Yes. Did he say that the company because of those several collisions, and particularly the one where the car was loaned to some friend of yours who had become intoxicated, was the reason the company couldn't continue carrying you, is that what he told you, sir?

"A. No, he never said that.

"Q. Did he mention those at all? [50]

"A. No, sir.

"Q. But he said because of some claims, the company didn't want to cover it anymore, isn't that correct?

"A. Well, he said it was just a hazard to them to carry me along because of the many wrecks I had had.

(Testimony of Oscar F. Erickson.)

“Q. And did he tell you therefore they were refusing to carry you further as an insured?”

“A. No, sir. He told me that if I wanted to have a hearing that I could after December, when the policy was cancelled.

“Q. Yes. But did he tell you that on account of this loss record or this number of hazards, that the company was cancelling, is that correct?”

“A. Yes.”

Now, were those questions asked of you and those answers given by you? A. Well——

Q. Answer that yes or no, sir.

A. Well, I never talked to Higgins——

The Court: Did he give those answers?

The Witness: I gave them answers, but I was referring [51] to my wife talking, that is how I gave them answers.

Mr. Walcom: Q. Mr. Erickson, passing for a moment to the time of that application with Allstate, you were not solicited by Allstate, but you went there on your own account to secure coverage, is that right?

A. I called them up and made an appointment.

Q. Yes. I will ask you whether or not it isn't a fact that you told the agent of Allstate that your policy with State Farm was expiring on the next morning? A. No, sir.

Q. You have seen that document which is the application—I wonder if Your Honor would permit me to look at the one that is in your hand.

I will show you the Plaintiff's Exhibit No. 3, Mr.

(Testimony of Oscar F. Erickson.)

Erickson, and—I beg your pardon, let's withdraw that question for the moment; put it in this fashion:

In addition to the information which is contained on the face of Plaintiff's Exhibit No. 3, Mr. Erickson, you were asked other information which was written on the reverse of that?

A. May I see it?

Q. Let me show you.

Mr. Friedman: May I see it, please, Mr. Walcom?

Mr. Walcom: Yes, the questionnaire.

Q. Let me ask you, first of all, Mr. Erickson, did you tell [52] the agent there that you were Swedish? A. No, I told him I was American.

Q. All right. Did you tell him you had been driving a car—a car for 40 years?

A. I probably did.

Q. Did you tell him you were a married man?

A. Yes, sir.

Q. Without any physical impairment?

A. That's right.

Q. And did you tell him you had one child?

A. That's right.

Q. 21 year old son? A. Yes, sir.

Q. Who was then in service?

A. Yes, sir.

Q. And that you were employed. You were then residing at, rather, you had lived at 414 Main Street, Ft. Bragg? A. Yes, sir.

Q. For 30 years? A. Yes, sir.

(Testimony of Oscar F. Erickson.)

Q. You had been employed at the Union Lumber Company in Ft. Bragg for 21 years?

A. That's right.

Q. Saw filer, occupation? A. Yes, sir. [53]

Q. Employed by the Independent Redwood Lumber Company? A. That's right.

Q. Had been so employed for a year and a half?

A. That's right.

Q. And your employer was in Booneville, California? A. Right.

Q. Did you also tell him your wife's name was Birdella? A. That is right.

Q. Aged 44? A. That's right.

Q. And she was a housewife? A. Right.

Q. And that she used the car about ten per cent of the time? A. That's right.

Q. Had no impairment of driving ability?

A. What is that?

Q. That she had no impairment of ability to drive?

A. Been driving a car quite some time.

Q. Did you tell him 20 years, did you?

A. That is what I said.

Q. And resided at the same address?

A. That's right.

Q. Did you tell him you had never had any accident or loss to your car? [54]

A. That's right.

Q. And in fact there had been some accidents to your car, though?

A. Oh, sure, but I never had any.

(Testimony of Oscar F. Erickson.)

Q. All right. And you gave him your driver's license number, didn't you?

A. That's right.

Q. And then you told him you had been insured with the State Farm Insurance Company?

A. That's right.

Q. Policy No. 528848-134-05, didn't you?

A. I suppose I did.

Q. Did you tell him that the expiration date of that policy was December 18?

A. No, sir. If it is in there, that is put in by somebody else.

Q. You told him that neither you nor any relative had previously been insured by Allstate, is that correct?

A. No, sir, not that I know of.

Q. And had no other automobile in the household?

A. No, sir.

Q. So that all that information which you related, the only thing which you say was not related by you is that the policy with State Farm expired on December 18?

A. I never said that. [55]

Mr. Friedman: And the fact that he was American, not Swedish.

Mr. Walcom: That is correct. We will put this in subsequently as an exhibit, merely wanted to interrogate the witness on it at this time.

Q. Now, Mr. Erickson, passing for a moment from your application, you, in due course, received your policy from Allstate Insurance Company, did you not?

A. Not right away, no.

(Testimony of Oscar F. Erickson.)

Q. But you did get it in due course?

A. That's right.

Q. And came the time when this accident occurred in February, whereupon your car was damaged, is that correct? A. Right.

Q. Now, your car was removed from Ft. Bragg down to San Francisco at no expense to you, is that true? A. That's true.

Q. And before that car was ever repaired by Ansel Schloss here in San Francisco you made a phone call to Ansel Schloss, didn't you?

A. I called them, yes.

Q. Yes. And do you recall with whom you spoke at the time you called? A. No, I don't.

Q. Could you tell us, if you know, on what date you made [56] that call? A. No, I don't.

Q. It is true, isn't it, Mr. Erickson, that when you made that call you told Ansel Schloss you wanted that car painted a different color than it had been?

A. They said they were going to repair it.

Q. I asked you whether you told Ansel Schloss to paint it a different color?

A. Yes, when he said he was going to repair it, and I told them if they were going to do that, to paint it black.

Q. It had been maroon and you wanted it black?

A. Correct.

Q. As a matter of fact, the gentleman with whom you talked asked you for authorization to repair the car, didn't he? A. No, sir.

(Testimony of Oscar F. Erickson.)

Q. He didn't? A. No, sir.

Q. Can you tell us what you said other than you wanted the car a different color?

A. I am sorry, it is a little bit too far gone, I couldn't remember.

Q. Would you deny that the man asked you for authority to——

A. He said it was all taken care of by the Allstate.

Q. He said that much, that it was all taken care of by Allstate? Now, you recall that. What else did he say? [57]

A. That is all he said. He said he was going to repair the car. I said, if you do repair the car, then I wanted it painted black.

Q. Isn't it a fact that he asked you for authority to go ahead with repairs?

A. On the black, yes, if he is going to repair it.
The Court: On the what?

The Witness: Paint it black, if he is going to repair it.

Mr. Walcom: Q. Didn't ask you for any authority to repair the car itself?

A. Not that I recall.

Q. Mr. Erickson, you say you never again heard from Ansel Schloss until some months later the car was going to be sold? A. That's right.

Q. You never went down to Ansel Schloss at all, never inquired as to the cost of the repairs?

A. No, I did not, sir.

Q. As a matter of fact, Mr. Erickson, isn't it the

(Testimony of Oscar F. Erickson.)

truth that you deliberately had nothing to do with securing the payment for the damage to your car at Ansel Schloss on the advice of your counsel because he was filing a lawsuit? A. That's right.

Q. Yes. Now, going back to this car, this car had about [58] 40,000 miles on it at the time of the accident, didn't it? A. About 35.

Q. About 35,000? A. Something like that.

Q. Actually it had been a new car in March of '51 when you purchased it from Greenwood Studebaker Agency down in Bishop, isn't that true?

A. That's right.

Q. And you had driven about 35,000 miles?

A. I imagine something like that.

Q. Something like that. And from the time that you got it in March of 1951 you drove it for a year, through 1952, and then you drove it through February of 1953, is that correct? A. Right.

Q. In other words, you had had that car about 23 months before this accident happened?

A. That's right.

Q. And it had about 35,000 miles on it?

A. That's right.

Q. How many times had it been in collisions prior to this particular accident, if you know?

A. Twice before.

Q. Now, there came a time, Mr. Erickson, when on or about the 24th of March, you received a letter from Allstate Insurance Company, which is an exhibit in this case, signed by a Mr. Daly, I think it is, dated March [59] 24, 1953, advising you that

(Testimony of Oscar F. Erickson.)

the Allstate Insurance Company was reserving all its rights? A. It was the 27th.

Q. The 27th you received it, I see. The letter is dated the 24th. A. The 17th——

Q. Yes, did you have any dealing with anyone at Allstate thereafter, sir? A. No, sir.

Q. And then subsequently after receiving that letter of reservation of rights, in April of 1953 you received a letter of disclaimer, which is in the file here, isn't that correct? A. Correct.

Mr. Walcom: Thank you, that is all.

The Court: I don't seem to have the letter.

Mr. Walcom: I thought counsel put that in evidence.

Mr. Friedman: Is that the one addressed to me?

The Court: The last one I have is March 24, that I see.

Mr. Friedman: That is the first time he knew about it——

Mr. Walcom: These reservations of rights, if I may approach the Bench?

The Court: I don't have any letter. [60]

Mr. Walcom: I will put it in then. Withdraw the question for this time, then. That is all, Mr. Erickson.

Redirect Examination

Mr. Friedman: Q. Mr. Erickson, you decided not to go near Ansel Schloss after you received the last letter in which the State Farm told you in writing that they were probably going to not pay under your policy, is that not right?

(Testimony of Oscar F. Erickson.)

A. Right.

Q. And then is when you consulted with me?

A. Correct.

Q. That was after that last letter?

A. That's right.

Q. Up until that time you had been dealing yourself with these people, is that right?

A. Right.

Q. Now, Mr. Erickson, I didn't go into it on the previous examination, I ask the Court's permission to let me go into the nurses' bills. For some reason I have overlooked that.

Mr. Erickson, did you ever see this bill addressed to your wife, Mrs. O. F. Erickson, for nursing services, six days at \$15 per day, by Mrs. Herman Matson, total \$90? A. Yes, sir.

Q. And do you have personal knowledge of when that service [61] was performed for your wife, and where, will you tell us, please?

A. That was in her home taking care of her after she got out of the hospital.

Q. Whose home?

A. Herman Matson's home.

Q. That is Herman Matson's home in Ft. Bragg? She took care of your wife for six days?

A. Six or eight days, something like that.

Mr. Friedman: I would like to offer this.

Mr. Walcom: I will object to it, if the Court pleases. The coverage on this policy only requires the—rather, requires the services of a professional

(Testimony of Osear F. Erickson.)

nurse and there is no evidence that Mrs. Herman Matson is a professional nurse.

Mr. Friedman: Q. Mr. Erickson, what is Mrs. Matson's qualifications as a nurse?

A. She is a nurse's aid.

The Court: What?

The Witness: She is what they call a practical nurse, not a nurse—registered nurse.

The Court: Where does she do her work?

The Witness: Used to work at the hospital at Ft. Bragg.

Mr. Friedman: Q. Did she actually work in the Ft. Bragg Hospital as a nurse?

A. Oh, yes. [62]

Q. How long did she do that?

A. Three or four years.

Q. Does she ever do private nursing?

A. Yes.

Mr. Friedman: Your Honor, I submit that she would qualify under the general terms of this policy. I don't know it says registered.

The Court: No, it doesn't.

Mr. Walcom: Professional is the term.

The Court: May be admitted and marked with the next number, 11. \$90?

Mr. Friedman: \$90, Your Honor.

(The nurse's bill above referred to was marked Plaintiff's Exhibit No. 11 and received in evidence.)

Mr. Friedman: Q. That was within the—well, within a year of the accident, was it not?

(Testimony of Oscar F. Erickson.)

A. Right after she left the hospital.

Q. Did your wife ever receive any other nursing care? A. Yes.

Q. Who was that from?

A. Mrs. Michaelson in San Lorenzo, she is a registered nurse, came up to Ft. Bragg and took care of my wife, and in turn, my wife went to her place in San Lorenzo and took care of her there.

Q. Give us some idea of the periods involved.

A. Well, a couple of months, two or three months.

Q. What months, can you tell us what months that was? A. No, I can't, offhand.

Q. Now, did you ever see this lady since this accident, yourself? A. Yes.

Q. As a matter of fact, did your wife go to San Lorenzo? A. Yes.

Q. You drove her there? A. I did.

Q. And have you ever seen a bill prepared by Mrs. Michaelson for her services? A. Yes.

Q. What is the amount of that bill?

A. \$650.

Mr. Walcom: Just a moment, Mr. Erickson.

If the Court please, I am going to object to this and I want to state my reason. On the 9th of December, 1953, interrogatories were presented to the plaintiff here; they were not answered until July of 1954. Subsequently we appeared before Your Honor to require certain answers to be made to the unanswered portions of those interrogatories. In the original interrogatories answers were given

(Testimony of Oscar F. Erickson.)

as to various bills, which included this item of \$90, which I [64] don't contest, Your Honor, because if there was any contest it was incumbent upon us, having been apprised, to make some investigation. But here this morning, coming into this court after interrogatories have been answered under oath setting forth in itemization, as the record reflects, every item of special damages, we are now presented with a bill which doesn't exist, or something, and I suggest, Your Honor, it is only an attempt to overcome the impediment of jurisdiction in this case.

They certainly could have presented a bill since 1953, February and March of 1953, through now, September, or rather October of 1954, if such a bill existed.

Mr. Friedman: Your Honor, counsel is quite right. It is very important that this bill be presented to the court, and I am attempting to elicit from this witness, and I will also subsequently from Mrs. Erickson, the reasons that this wasn't filed, presented before. The Court——

In reference to jurisdiction, the Court is quite familiar with the rule that there will be a liberal amount of amendments to pleadings to permit the plaintiff to show these damages to support the allegations of jurisdiction.

I have here—amending complaint, permissible instead of dismissal, should not be dismissed if plaintiff desires an amendment. In 28 Fed. Supp.—

Mr. Walcom: Not talking about amendments.

(Testimony of Oscar F. Erickson.)

The Court: We are talking about evidence.

Mr. Friedman: That is right. Your Honor may recall at the opening of the case I made an offer of an amendment, there was objection, the Court seemed to admit and allow the admittance I suggested at the very opening of the trial, to allow this particular bill, and I think it is very important.

The Court: I never allowed any bill, counsel.

Mr. Friedman: I mean, excuse me, the damages alleged.

The Court: That wouldn't cover this point. We are talking now about the evidence, about a bill.

Mr. Friedman: I am attempting here, Your Honor, to enable these plaintiffs to show the Court that they are obligated to pay an additional \$700 for medical services, and it is admitted that these were not placed in the answers of the interrogatories: previously at the opening of the case I submitted this question to the Court and told the Court that the plaintiff here wanted to expand these answers to include this item of damage.

I feel that since the jurisdictional amount is very important here——

The Court: Counsel, there is a lot of conversation here by both of you, but I am just talking about the issue that is before me right now.

Now, what did you say, Mr. Walcom? What was your [66] objection to this?

Mr. Walcom: I say, in all fairness——

The Court: Just state your objection.

(Testimony of Oscar F. Erickson.)

Mr. Walcom: My objection is, we have had no opportunity here under the interrogatories.

The Court: What is the interrogatory that you asked for?

Mr. Walcom: Interrogatory No. 15.

“Please list the names of all doctors who have submitted bills to you on behalf of Mrs. Birdella Erickson and the amounts of any bills incurred as a result of injuries suffered by her on February 15, 1953.”

And the names of doctors and copies of medical reports. In response to that, counsel, in his response to Interrogatory No. 15, listed at considerable length on page 2 and 3 these items: Cost of removal to the hospital, \$15; Dr. Barnes, \$231.50—that is for Birdella. For Fred Erickson, \$21. Stanford-Lane Hospital, and the doctors are \$81. Then there were the drugs and pharmacy, x-rays and bills like Mrs. Herman Matson for nursing care, with a total of \$476.27.

Those were the bills in July of 1954, a year and some four or five months afterwards, upon which we could rely as we come into this case.

The Court: What is your explanation, counsel?

Mr. Friedman: The explanation——

The Court: As to why it wasn't included there.

Mr. Friedman: I think the explanation is that my clients told me at that time that they had, she had received, Mrs. Erickson had received this nursing care, but that she was having difficulty having a bill delivered to her by the lady that furnished

(Testimony of Oscar F. Erickson.)

the care, and that for that reason, because the bill had not been delivered, I did not place it in the answers.

But I submit, that is what I am attempting to offer here, an explanation of the fact that the services were performed, that there is an obligation, that the lady prepared a bill actually, but for personal reasons did not deliver it, and that under the law these plaintiffs are obligated to pay that, and that is the reason it was not in the answers because we hadn't actually received a bill, but the services were performed, and I submit the obligation is owed the registered nurse to perform these services, and actually Mrs. Erickson's willingness, a bill was prepared and itemized but not delivered to her.

The Court: The purpose of the interrogatories is to advise counsel of all facts that he may get prior to trial and should have been included.

However, the language of the interrogatory says, "amounts of any bills incurred". [68]

Mr. Friedman: I submit it is a bill incurred, Your Honor.

The Court: Why didn't you answer it, then?

Mr. Friedman: Because—I am at fault, I felt the bill hadn't been delivered, that it wasn't proper, but I have changed by view at this time, and I feel that under the law, since it would involve a jurisdictional question—in other words, if this bill is not allowed we may not fall within the \$3,000 amount and since it was a legitimate bill which was incurred

(Testimony of Oscar F. Erickson.)

and the actual written bill was not delivered, that it is only fair.

Counsel is not suffering here; I don't see what they are losing under these circumstances. The main issue is whether or not there has been a fraud practiced upon the defendant Allstate, not what the actual amount of the bills are.

If justice is to be served, and that is the bill, it seems only fair that these people, if I was at fault in not including it, certainly the Court can allow it at this time because there is no harm that I can see here to the Defendants, they were obligated to pay their bills.

The Court: I think, I am inclined to think that the Court would have the discretion, if it is not proper, to exclude the bill.

However, I am going to let you produce evidence concerning [69] it.

Mr. Friedman: Thank you very much.

Q. Mr. Erickson, you say you took your wife down to San Lorenzo? A. That is right.

Q. To this lady. What was her name?

A. Mrs. Michaelson.

Q. And she is a registered nurse?

A. Yes, sir.

Q. And how long did your wife stay there with her?

A. Well, I can't recall just how long she was down there, for at least a month or two.

The Court: Now, Mr. Erickson——

The Witness: Yes, sir.

(Testimony of Oscar F. Erickson.)

The Court: You're under oath, and I expect you to give us your best judgment. I think you can come a little closer to answering than by saying she was there a month or two.

The Witness: Well, she was there for a while and I took her home and Mrs. Michaelson stayed at my place and took care of her, and I took her back to San Lorenzo again because she went to the Stanford-Lane Hospital with a head injury.

Mr. Friedman: Q. The Court is trying to ascertain, give us as close as possible what months was this when this happened? [70]

A. That was about two months after the accident she was permitted to go down to the City.

Q. The accident occurred on February 15, so that would be some time in April?

A. That's right.

Q. Your wife went down there and stayed then?

A. That is right.

Q. For how long?

A. About a month, I will say.

Q. And then did she come back to Ft. Bragg?

A. Yes, sir.

Q. How long did this lady stay with her there?

A. Stayed there about two weeks.

Q. Have you ever seen a bill prepared by this lady?

A. I have never seen it myself, but my wife has.

Q. You haven't seen it? A. No, sir.

Mr. Friedman: I will have to get that from Mrs. Erickson, Your Honor.

(Testimony of Oscar F. Erickson.)

Recross Examination

Mr. Walcom: Q. Mr. Erickson, on your redirect examination, did I understand you to say that Mrs. Erickson was taking care of Mrs. Michaelson in turn? A. Sir?

Q. Was she in turn taking care of Mrs. Michaelson at any [71] time?

A. Not that I know of.

Q. As a matter of fact, Mrs. Michaelson was a family friend, I take it?

A. Not necessarily, no. She worked at the hospital.

The Court: She what?

The Witness: She worked at the Ft. Bragg Hospital for about 20 years.

Mr. Walcom: Q. You knew her as an old resident of Ft. Bragg?

A. Well, I knew all the nurses up there.

Q. And she was a family friend?

A. Well, like any other nurse is a friend, yes; not necessarily.

Q. Have a lot of nursing friends, sir?

A. Oh, I have quite a few of them, yes.

Q. And your wife's visit down here was to visit a friend, was it not? A. No.

Q. As a matter of convenience?

A. She is taking care of her husband in San Francisco. Her husband lives in San Lorenzo.

The Court: Mrs. Michaelson lives in San Lorenzo?

The Witness: Yes, Henry Michaelson is his name.

(Testimony of Oscar F. Erickson.)

The Court: And you say she was taking care of him? [72]

The Witness: That is her husband.

The Court: Is he ill?

The Witness: Well, he was here at the time my wife——

The Court: She was taking care of her husband who was ill?

The Witness: No.

The Court: You said her husband was ill; was he or not?

The Witness: No, I said her husband lives in San Lorenzo.

The Court: Was she ill?

The Witness: Not Mrs. Michaelson, my wife was, yes.

Mr. Walcom: Q. Your wife was living over at Mrs. Michaelson's and then she would go over to the Stanford-Lane Hospital for treatment?

A. That's right.

Q. Your wife wasn't in bed?

A. No, not to my knowledge.

Mr. Walcom: That is all.

Redirect Examination

Mr. Friedman: Q. Did Mrs. Michaelson perform nursing care for your wife at that time?

A. That is right.

Q. What was its nature, do you know?

A. I don't know, not more than nurses do, gave

(Testimony of Oscar F. Erickson.)

her shots [73] and stuff like that and drugs for her head injury.

Recross Examination

Mr. Walcom: Q. Mr. Erickson, you never saw Mrs. Michaelson give your wife any shots of medicine, did you?

A. No, I never seen it myself, no.

Mr. Walcom: That is all.

Mr. Friedman: I have no other questions, at this time, Your Honor.

The Court: That is all.

(Witness excused.)

Mr. Friedman: Is the representative of Mr. Schloss here?

JOE AIELLO

called as a witness on behalf of the Plaintiffs, being first duly sworn, testified as follows:

The Court: What is your name, please?

The Witness: Joe Aiello.

Direct Examination

Mr. Friedman: Q. Mr. Aiello, you're here in response to a subpoena served on Ansel Schloss, is that right?

A. For the car being repaired.

Q. For the repair bills. Will you look at those, please? Who ordered the repairs?

Mr. Walcom: Just a moment.

Mr. Friedman: Q. Whose car is involved there?

A. Mr. Oscar Erickson. [74]

(Testimony of Joe Aiello.)

Q. Can you tell us the kind of car that is?

A. It is a Studebaker, model H, license 5U 8846.

Q. When did the car reach Ansel Schloss?

A. This bill is dated 3/10/53.

Mr. Walcom: I will ask that go out as not responsive, if the Court pleases.

The Court: Do you know when the car got there?

The Witness: No, sir.

Mr. Friedman: Q. Do you know from looking at those records who ordered the repairs?

Mr. Walcom: I will object to that as calling for an opinion and conclusion of the witness.

The Court: I think it does.

Mr. Friedman: Right from the record, Your Honor.

Mr. Walcom: Same objection to the records.

Mr. Friedman: Q. Are these records kept in the ordinary course of business by this company?

A. Yes, sir.

Q. Now, referring to automobile repair estimate——

The Court: What is the purpose?

Mr. Friedman: The purpose, Your Honor, is to show the work was ordered by the representative of Allstate, and not by Mr. Erickson.

The Court: Well, so what?

Mr. Friedman: Well, the purpose, the only thing there [75] is that Erickson has lost his car.

The Court: The value of the car would be de-

(Testimony of Joe Aiello.)

terminated by its market value as of the time, wouldn't it?

Mr. Friedman: Well, on that point, Your Honor, I would submit that Your Honor is quite correct in that view. On the other hand, the law does allow a party who owns a vehicle to place an estimate of value.

The Court: He has done that.

Mr. Friedman: Pardon me?

The Court: He has done that.

Mr. Friedman: Yes, he has done that, that is the only purpose.

The Court: He has done it. He is permitted to testify as to the value of the car and Mr. Erickson has given his estimate.

Mr. Friedman: Yes, and the only purpose here was to show that this work had been ordered by Allstate and not by Mr. Erickson. Mr. Erickson testified his car was a total wreck.

That is all.

The Court: Any questions?

Cross Examination

Mr. Walcom: Q. Mr. Aiello, were you employed by Ansel Schloss at the time of—February or March of 1953? A. Yes, I was. [76]

Q. But I take it you had nothing to do with this particular transaction at that time?

A. No, sir.

Q. May I just see these records that were subpoenaed, sir? I want to take a look at them.

(Testimony of Joe Aiello.)

You have already advised us that these are records which are ordinarily and regularly kept in the course of business of Ansel Schloss in San Francisco, is that correct? A. Yes.

Q. Regular business entries.

Mr. Walcom: May we have these marked for identification at this time, if the Court please?

The Witness: I would like to have the originals.

Mr. Walcom: Let me say this, Mr. Aiello, the Court will take care of these and they will be returned to you at the conclusion of the case.

May we have this marked as Defendant's Exhibit No. 1, if the Court pleases?

The Court: Defendant's Exhibit B for identification.

(The records above referred to were marked Defendant's Exhibit B for identification.)

The Court: Is that all?

Mr. Walcom: That is all.

The Court: That is all. Step down.

(Witness excused.) [77]

The Court: How long do you expect to take, counsel?

Mr. Friedman: I shouldn't take—I only have one objective now, to show evidence as to the nursing services performed by this——

The Court: How long do you expect to take, counsel?

Mr. Walcom: I would say about an hour and a half, Your Honor.

The Court: It was sent in as a half-day case, the reason I asked the question.

Mr. Walcom: Lawyers are always optimists, Your Honor. I think we were advised by Mr. Friedman that he would take the better part of the day this morning.

Mr. Friedman: I felt we could stipulate to a great deal; however, we are having some difficulty on that, getting much done by stipulation.

Mr. Walcom: I am sure it will not take more than an hour and a half, Your Honor.

Mr. Friedman: Your Honor, as a matter of fact, the evidence is limited to just the documents that are there and proof of the damages. I don't think that should take very long. If it is expanded, of course, to include conversations had with my people, it would take considerably longer.

The Court: We will take a recess at this time; I thought maybe we could finish by running to 1:00 o'clock and then be [78] through, because it was sent in as a half-day case, but if that can't be done, why, we will take a recess at this time until 1:45 p.m.

(Whereupon, an adjournment was taken until 1:45 p.m. of the same day.) [79]

Afternoon Session—October 15, 1954

Mr. Friedman: Will you take the stand?

BIRDELLA ERICKSON

called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

The Court: State your name, please.

The Witness: Birdella Erickson.

Direct Examination

Mr. Friedman: Q. Are you the wife of Mr. Erickson, who just testified this morning?

A. Yes, I am.

Q. And Mrs. Erickson, are you the party who was driving the car involved in this case on or about the 15th day of February, 1953?

A. Yes, I was.

Q. And you have heard the testimony of Mr. Erickson this morning of your receiving treatment at the Ft. Bragg Hospital, is that true?

A. That is true.

Q. And that was the result of the accident, as far as you know? A. Yes.

Q. And you also heard Mr. Erickson's testimony as to your receiving care, nursing care, from a lady whose bill we have included in evidence. What was her name again? [80]

A. Mrs. Michaelson or Mrs. Matson.

Q. Mrs. Michaelson or Mrs. Matson?

A. That's right.

Q. There is a question about the bill of Mrs.

(Testimony of Birdella Erickson.)

Michaelson. Would you please tell the Court what, if anything, Mrs. Michaelson did for you in the way of nursing? A. Well——

Mr. Walcom: Just a moment, Mrs. Erickson. I will object to this as incompetent, irrelevant and immaterial, Your Honor, as to whether or not there has been a bill.

Mr. Friedman: Well, leading up to that, Your Honor.

The Court: I think they are entitled to show what the facts are.

A. We were living in Booneville, and in Booneville there was no doctor or no nurses, so I had to get outside help, so I got a woman living in the community to take care of me. But my doctor in Ft. Bragg told me that I needed someone that could watch over me more thoroughly than that the major portion of the time.

However, I was able to be up and around, but I wasn't able to take care of my household chores and to do for myself.

The Court: Well, then, did you have someone in to do your household chores?

The Witness: That is true; I had a neighbor lady, but [81] the doctor in Ft. Bragg didn't think she was quite right, he wanted to put me back into the hospital, back in Ft. Bragg, and I didn't want to go, so then it became necessary for me to get somebody else that the doctor approved of to take care of me.

Mr. Friedman: Q. Now, you say to take care of

(Testimony of Birdella Erickson.)

you. Which doctor is this that is doing this, advising you this way?

A. This is Dr. Barnes.

Q. He is at the Ft. Bragg Hospital?

A. That's right.

Q. And then what did you do in reference to that?

A. Well, then, we telephoned Mrs. Michaelson and asked if she could come up for a few days, which she did, and then I returned, or then she went back to San Lorenzo.

The Court: When she came up there, how long did she stay?

The Witness: Well, Your Honor, it was a period of nearly a week, because her husband came back from overseas, and she felt that she couldn't stay with me when her husband was home in San Lorenzo.

The Court: How long did she stay?

The Witness: Oh, approximately a week.

The Court: When you talked to her about coming up there, did you—what was said about paying her, if anything? [82]

The Witness: Well, knowing that she was a registered nurse and feeling that she was capable, I felt that I was obligated to pay her.

The Court: Did you hear my question, Mrs. Erickson? I said, what was said about paying her?

The Witness: Well, in discussing a bill at that time, we didn't.

The Court: You didn't talk about paying her?

(Testimony of Birdella Erickson.)

The Witness: No, not about paying her, no, sir.

Mr. Friedman: You knew this lady very well, did you not?

A. Yes, I have known her over a period of years, yes, sir.

Q. And you called her up and you knew her qualifications as a registered nurse?

A. That is true.

Q. You didn't discuss a bill with her at that time? A. No.

Q. She left, you say, within approximately a week? A. That is true.

Q. And returned to San Lorenzo?

A. That is right.

Q. Did you stay in Booneville or did you go down to San Lorenzo?

A. I believe my husband took me to San Lorenzo after she left. [83]

Q. How long after was that?

A. Within a period of three or four days.

Q. And did you stay with her down in San Lorenzo? A. That is true.

Q. Did she perform any nursing services for you in San Lorenzo?

A. Not any more than what Dr. Barnes prescribed, and mostly it was being kept quiet and having someone near me, not being left alone.

Q. Put it this way: Did you do any of the cooking or the house cleaning, doing any of the chores down there?

A. No, she waited on me totally, even to the—

(Testimony of Birdella Erickson.)

well, I went to bed, and got up in the morning, and she prepared my meals and served them to me.

Q. Now, how long did you stay there in that status?

A. Well, at that time I was there was also about the time I went into Stanford-Lane Hospital for extra care, and this, too, was under the advice of Dr. Barnes, and so it was her travelling with me from San Lorenzo and going with me to the hospital and having a person with me and not being alone.

Q. Will you tell us, please, what period of time this occurred, over what period of time?

A. This is for practically three weeks.

Q. That is, one week up in Booneville and three weeks down there? [84]

A. That's right.

Q. Did you stay there or leave there?

A. Yes, and then I felt I was able to go back home. In fact, I was anxious to return to Booneville, which I did.

Q. Can you give us the approximate date you returned to Booneville? Approximately, within a week or two weeks?

A. I am afraid I can't; it was approximately two months after the accident.

Q. That you returned to Booneville?

A. That's right.

Q. You feel you had been down there about, would you say, three weeks?

A. That's right, that is correct.

Q. Is the total amount of nurses' care then, one month for Mrs. Michaelson?

(Testimony of Birdella Erickson.)

A. That is true, with the exception that I would come back and stay in her home on my other trips that I went up to Stanford-Lane.

Q. Oh, I see. How much time was that altogether?

A. I made three or four trips back down to Stanford-Lane. Each time I would stay with Mrs. Michaelson in San Lorenzo.

Q. Was this being done—put it this way: Did you reach any understanding at that time with her about a bill for her services?

Mr. Walcom: Just a moment. I will object to any [85] understanding, if the Court please.

Mr. Friedman: I will rephrase it.

Q. Did you ever have a conversation with her during that period as to her being paid for the services? A. Yes.

Mr. Walcom: Just a moment. I will object to that as hearsay, if the Court pleases.

Mr. Friedman: It is a conversation of the witness herself. I realize that party is not here, but trying to establish the reason no bill was submitted here.

The Court: Who are the plaintiffs in this action?

Mr. Friedman: Mr. Erickson is the plaintiff, Your Honor. Her husband.

The Court: The objection made that it is hearsay, it is as to——

Mr. Friedman: Well, withdraw the question.

Mr. Friedman: Q. Was a bill ever prepared to your knowledge, in your presence, which was made

(Testimony of Birdella Erickson.)

out to Mr. Erickson for nursing services performed for you by this lady, Mrs. Michaelson?

Mr. Walcom: Just a moment. I will object to that, if the Court please, as incompetent, irrelevant and immaterial. The best evidence would be the bill.

Mr. Friedman: Well, Your Honor, that may be.

The Court: I will permit the answer; yes or no on this [86] question.

The Witness: Yes.

Mr. Friedman: Q. You did see such a bill?

A. Yes.

Q. And where and when did you see that?

A. I saw that in Mrs. Michaelson's home.

Q. When was that, approximately?

A. It was approximately two months or three months after I had visited her the last time when I had came back and spent a night in her home, or spent another evening with her.

Q. What was the amount of that bill?

A. I don't remember the exact figures, because I didn't go over it too thoroughly, or check her figures, but I know it was close to \$700.

Q. All right. Why didn't you receive that bill, or why don't you have that bill with you?

Mr. Walcom: Just a moment. It is incompetent, irrelevant and immaterial why she wouldn't have it, Your Honor.

The Court: As to why she doesn't have it, I think is cross-examination of your own witness.

Mr. Friedman: All right.

(Testimony of Birdella Erickson.)

Mr. Friedman: Q. You don't have that bill, do you? A. No, I don't. [87]

Q. Is that the fair reasonable value of her services?

Mr. Walcom: Just a moment. I will object to that as incompetent, irrelevant and immaterial and no foundation laid, if the Court pleases, to this witness' qualifications to establish reasonableness of a document not in evidence.

The Court: I think the objection is well taken.

Mr. Friedman: Q. Mrs. Erickson, are you and your husband, Mr. Erickson, obligated to pay this sum of approximately \$700 to Mrs. Michaelson for her services performed for you as a nurse?

Mr. Walcom: Just a moment, Mrs. Erickson.

If the Court please, I object to that as calling for the opinion and conclusion of this witness.

The Court: Sustained.

Mr. Friedman: Q. Do you owe, you and Mr. Erickson, owe this lady \$700?

Mr. Walcom: I will make the same objection, if the Court please, and also in evading the province of the Court.

Mr. Friedman: I don't see it myself, Your Honor.

The Court: Sustained.

Mr. Friedman: I am trying, I don't know how to do it any other way to present to the Court the fact that the——

The Court: Counsel, I am not very much im-

(Testimony of Birdella Erickson.)

pressed by that claim, frankly. I have heard the story and it doesn't carry very much weight with me.

Mr. Friedman: Well, of course, if the Court feels that way—I mean, I just want to get in evidence the fact that to show the services were performed and the fact that she is obligated to pay her.

The Court: If the bill had been sent we could then examine the person who was making the claim for that amount. We don't have that, and the circumstances explained by the witness—it doesn't look like a relationship of nurse and patient to me. I think that could be developed by a few questions.

Mr. Friedman: I see.

Mr. Friedman: Q. Mrs. Erickson——

Mr. Friedman: I have asked every question I can think of in that respect. The testimony here before the Court is that the nursing services have been performed for a period of four weeks. There was a discussion about the bill, but a bill was prepared and not actually delivered in the sum of \$700. I don't know what I can ask her to show the relationship.

The Court: Well, proceed. I will have to rule on it as they come up.

Mr. Friedman: Q. Do you intend to pay Mrs. Michaelson the sum of \$700 for her services?

Mr. Walcom: Just a moment. I will object to that, if the Court pleases, there is no evidence of any bill. [89]

Mr. Friedman: Your Honor——

Mr. Walcom: Let me finish, please, Counsel.

(Testimony of Birdella Erickson.)

This witness is not part of this action.

Mr. Friedman: Naturally she is not a party *per se*, but the insurance policy is in the name of Mr. Erickson, and the policy covers the bills and suing for his spouse and—in other words, the major bills were, as far as medicals are concerned, her bills, not his bills, the company is obligated to pay all these bills if they are proved to the satisfaction of the Court. Now, we don't always have bills in cases where people perform services, that does not necessarily dispense with the *sine quo non* of the obligation to pay.

The Court: The policy provides to pay all reasonable expenses incurred for necessary professional nursing services. Now, so far the evidence is not that the bill was incurred for professional nursing services.

Mr. Friedman: Q. You know Mrs. Michaelson is a registered nurse, isn't that correct?

A. That is true.

Q. Has she been working at her profession the last few years?

Q. Yes, but it's intermittently. She doesn't work as a steady nurse.

Q. Were these services she performed for you in the nature [90] of professional services performed by a registered nurse?

Mr. Walcom: Just a moment, Mrs. Erickson.

If the Court please, I will object to this as calling for a conclusion of this witness, and the entire line

(Testimony of Birdella Erickson.)

of interrogation is self-serving. Object on both those grounds, if the Court please.

Mr. Friedman: Have to ask these questions, Your Honor, because there is no other way of showing the Court what was done here.

The Court: I think that would be better if you showed what was done and have the Court determine it.

Mr. Friedman: Q. Have you told us everything that this lady did for you?

A. I believe so.

Q. Was there anything else in the nature of the nursing services that could be done for you after that time?

Mr. Walcom: I will object to that as incompetent, irrelevant and immaterial what might have been done or could have been done.

Mr. Friedman: Q. Did the Doctor order these services to be performed?

A. That is true.

Q. Did the doctor say what they were to be?

A. Yes.

Q. Will you tell us what he said about them?

Mr. Walcom: Just a moment. I am going to object to that as hearsay evidence.

The Court: I think she can say what was done for her, counsel.

Mr. Friedman: She has testified already that the doctor, that is, the services consisted of cooking for her, accompanying her.

(Testimony of Birdella Erickson.)

Mr. Friedman: Q. Were there any drugs administered by this woman to you?

A. Yes, but in, only in pill and capsule form. She took care of the medicines that was prescribed.

Q. She did do that? A. Yes.

The Court: What do you mean, "She took care of it?"

The Witness: Well, when it was time to take pills, she brought me the glass of water and the pills.

The Court: Couldn't you do that yourself?

The Witness: Well, they were drugs of such nature the doctor thought better that a nurse take care of them and handle and take care of me.

Mr. Friedman: Q. Did she administer any shots of any kind to you?

A. No, she didn't.

Q. She didn't? A. No. [92]

Q. Have you told us all the services she performed for you?

A. Within my knowledge, yes.

Mr. Friedman: I have no further questions, Your Honor.

Cross Examination

Mr. Walcom: Q. Mrs. Erickson, you don't mean to say that the doctor told Mrs. Michaelson to go bring you a drink of water when you took a pill, do you? A. No, that isn't true.

Q. I appreciate that. And Mrs. Michaelson was a friend whom you had known for a good many years, isn't that true?

(Testimony of Birdella Erickson.)

A. But not as a very close friend; she was an acquaintance, yes.

Q. And when you come down to San Francisco, you have told us that you would spend a night and on occasions, two, wouldn't you?

A. After she had come up and I had gone down and she had taken care of me, I went back to see her, yes.

Q. And you would spend a night there and that was just a friendly visit?

A. No, I felt it was an obligation to go and see her after she had rendered those services to me.

Q. In other words, you would go, as you say, you felt an obligation to visit this lady?

A. That is true. [93]

Mr. Walcom: Thank you, that is all.

Mr. Friedman: I have no other questions, Your Honor.

The Court: That is all. Thank you.

(Witness excused.)

Mr. Friedman: Your Honor, that is the plaintiff's case.

Mr. Walcom: Now, at this time, if the Court pleases, before presentation of any further evidence on behalf of the defendant, I would like to ask that a judgment of non-suit be entered on behalf of the defendant. And I base that, if the Court pleases, on the fact that the uncontradicted evidence reflects that at the time this application on December 17 was executed, at that time the plaintiff was aware of the fact that he had had his policy of insurance

with the State Farm Insurance Company cancelled effective as of the 27th day of December. And furthermore, that he had knowledge at the time of the receipt of that letter that an insurance company refused to extend insurance to him, and all, of course, within a two-year period preceding the date of his application with Allstate Insurance Company.

Now, I say that because under certain sections of our Insurance Code, which I know Your Honor will follow as the law, that governs this situation, and bearing in mind the Erie case, you must, or should apply the law of the jurisdiction in which this controversy arises. We have before us [94] in our Insurance Code Chapter III, Negotiations before Execution——

The Court: Well, now, counsel, let me interrupt you for a second. I think in Federal Court you have a motion for dismissal rather than a non-suit. I suggest you make that motion and that it be taken under submission, and then if you have any evidence to put on, we can go ahead and consider that all together.

Mr. Walcom: Very well, I shall do that.

The Court: Present your law at that time.

Mr. Walcom: Thank you, Your Honor, I shall defer it. The first witness that the defendant will call is Mr. Cowden. Will you step up here, sir?

G. M. COWDEN

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Court: State your name, please.

The Witness: Cowden.

Direct Examination

Mr. Walcom: You are Mr. G. M. Cowden, sir, (spelling) C-o-w-d-e-n? A. Yes.

Q. What is your address, Mr. Cowden? [95]

A. My home address or business address?

Q. Well, your business address?

A. 1947 Center Street, Berkeley, California.

Q. And is that the State Farm Insurance Company? A. Yes.

Q. I take it, then, you are employed by that organization? A. Yes.

Q. In what capacity are you employed, Mr. Cowden?

A. I am the underwriting superintendent, presently, of our Southern California Division.

Q. You were so employed by the State Farm, or were employed by the State Farm Insurance Company, in December, 1952, were you?

A. Yes.

Q. And at that time what was your capacity, sir?

A. I was underwriting superintendent of what we referred to as our Northern California Division.

Q. Now, Mr. Cowden, pursuant to a subpoena

(Testimony of G. M. Cowden.)

have you appeared today bring with you records regarding insurance coverage extended to Oscar F. Erickson and Birdella Erickson by this company in that period, December of 1952?

A. Yes, I have.

Q. May I see those, sir?

The Court: There isn't much question about that, Gentlemen. Can't we handle this a little more expeditiously? [96]

Mr. Walcom: Perhaps we can, Your Honor.

Mr. Walcom: Q. Mr. Cowden, you were the author of the letter of December 15th directed to Mr. Oscar Erickson, is that correct, sir?

A. Yes, I signed it.

Mr. Walcom: May we have that exhibit, if Your Honor pleases? Thank you.

The Court: The fifteenth?

Mr. Walcom: Yes, it is the copy, one of the plaintiff's exhibits. I believe it is attached to this letter. Yes.

Mr. Walcom: Q. I will show you, Mr. Cowden, the plaintiff's Exhibit No. 5, which is a letter of December 15, 1952, which is signed, apparently, G. M. Cowden.

A. Yes, the original of this is a form letter which we fill in the spaces and I signed it.

Q. That reflected that——

The Court: The letter speaks for itself, it is in evidence.

Mr. Walcom: Very well, Your Honor.

The Court: Isn't any question about it.

(Testimony of G. M. Cowden.)

Mr. Walcom: In your file I notice, Mr. Cowden, you have a draft payable to O. F. Erickson and/or Birdella A. Erickson for \$11.35 issued on December 15, 1952, payable to their order. Is that the draft that was mentioned in that letter, sir?

A. Yes. [97]

Q. You have prepared a photostatic copy of it, have you not? A. Yes.

Mr. Walcom: May we ask that that be marked as the defendant's exhibit next in order, if the Court please, in lieu of the original?

The Court: Defendant's Exhibit C.

(Whereupon check referred to above was received in evidence and marked Defendant's Exhibit C.)

Mr. Walcom: Q. I am sure your records are stamped cancelled on this policy, are they not?

A. Yes.

Q. And it bears the comment at the top, "Cancelled December 27, 1952——"

Mr. Friedman: Just a moment, you were going to read from this? I don't know the purpose of this at all; Your Honor has stated it is all here, the letter is here, the policy is here, and the issue is clear.

The Court: I would think any communication between their policyholder and the company which was submitted to the policyholder would be admissible, but I don't think any inner-marking on their file is admissible.

Mr. Walcom: Very well, withdraw it, Your

(Testimony of G. M. Cowden.)

Honor. Thank you. That is all, Mr. Cowden. Counsel may cross-examine. [98]

Cross Examination

Mr. Friedman: Q. Mr. Cowden, the effective date of that cancellation was December 27th, 1952, is that right?

A. 12:01 a.m. Standard Time, on that date.

Q. And the check you gave to Mr. Erickson was for the un-expired term of the policy as of December 27, 1952, is that right?

A. The unearned premium from that date.

Q. Thank you.

Mr. Walcom: Just one further word, Mr. Cowden.

The Court: Let me see that.

Redirect Examination

Mr. Walcom: Q. In addition to that letter, stating that the policy was cancelled, with the effective date, you mentioned in your first paragraph that it was your desire to be relieved of liability for insurance for him, did you not? A. Yes.

Mr. Walcom: That is all, thank you.

Examination by the Court

The Court: Q. Mr. Cowden, who did you send this draft to, do you recall?

A. Yes, Your Honor, it was sent to the agent of record of the policy, at that time a Mr. C. D. Van.

Q. Were there any instructions as to what he was to do with it?

A. There were no instructions on the letter itself. However it is established procedure with our

(Testimony of G. M. Cowden.)

company that wherever there is mortgage existing on a vehicle we are insuring that the return premium go through the agent to see whether or not any other interested party has an interest in the unearned premium.

Q. Any instructions to your agents as to what they do with the check? A. No, sir not in the letter.

Q. Well,——

A. Merely through company procedure.

Q. Well, you just don't send a check to the agent without telling him what to do with it.

A. The check was sent with the copy of the cancellation letter.

Q. All right. Wasn't there some statement as to when the check should be delivered to the policyholder? A. No, sir.

Q. Actually have you any record showing when the check was delivered to the policyholder?

A. No, sir, we do not.

Q. I can't read these cancelled stamps very clearly, but it appears to me to be cancelled on February 5, 1953, is that [100] right?

Mr. Walcom: It may be clear on the original. May we see the original, Mr. Cowden?

Yes, there is a clearing house stamp, if the Court please, says February 5, 1953.

The Court: I think that is what the perforation says that it was paid.

Mr. Walcom: Yes, Your Honor.

The Court: The perforations in the check show paid 2-5-53.

(Testimony of G. M. Cowden.)

Mr. Walcom: They didn't get it until much later.

The Court: All right, fine. That is all.

(Witness excused.)

Mr. Walcom: Mr. Gamber.

VAL GAMBER

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Court: State your name, please.

The Witness: Val Gamber.

Direct Examination

Mr. Walcom: Q. Would you state your address, Mr. Gamber?

A. Residence is 210 Brown Street, and business is 455B, Santa Rosa. [101]

Q. And what is your business or occupation?

A. Insurance Agent.

Q. By whom are you employed?

A. Allstate Insurance Company.

Q. Was that your employment, Mr. Gamber, December of 1952? A. Yes, sir.

Q. Calling your attention to a document—may I have the application?—to this document, which is the plaintiff's Exhibit No. 3. Mr. Gamber, do you recognize that? A. Yes, sir, I do.

Q. And is that a copy, a carbon copy of an application taken by you on that day?

A. It is.

(Testimony of Val Gamber.)

Mr. Walcom: Now, I will offer this at this time.

Mr. Friedman: What are you reading from?

Mr. Walcom: The original of that.

Mr. Walcom: Q. I will ask you if you recognize this document I hand to you?

A. Yes, sir.

Q. Is this the original application of which Plaintiff's Exhibit No. 3 is a carbon copy?

A. It is.

Q. And I notice on the reverse of the Plaintiff's copy there is certain information there entitled "Conditions Respecting Binder and Non-Binder," is that correct? [102]

A. That is correct, sir.

Q. And so that the Court and counsel and all of us will be apprised in the manner in which you take these applications, I have secured copies of this form R16-21, which is the number of that form.

Mr. Friedman: May I see that, please?

Mr. Walcom: And I will give you, counsel, some copies so you may observe them.

Mr. Walcom: Q. And I will ask you whether or not these are issued, whether these are drawn in triplicate, Mr. Gamber? A. They are.

Q. And the original copy is the one which you have before you? A. Yes.

Q. This folder, which we will presently put in evidence, and the carbon copy, goes to the applicant, is that correct? A. That is correct.

Q. The third copy of that remains in the book as your memorandum, is that correct?

(Testimony of Val Gamber.)

A. Yes.

Q. All right. Now, Mr. Gamber, in addition to—first of all, do you recall about what day, what time of the day or night that you were seen by Mr. Erickson on this particular occasion?

A. The application reads 6:05. I imagine it would be a [103] Thursday night, because we were open until nine that day, I should say.

Q. First of all, did you ask him whether or not within two years that any insurer ever cancelled any automobile insurance issued or refused any automobile insurance to him or anyone in his household, did you ask him that question?

A. Yes, I did.

Q. What was his reply? A. No.

Q. And did you ask him,—first of all, what was the purpose of asking him that question?

Mr. Friedman: Your Honor, I am going to object to the purpose. I would imagine it is rather obvious on the face what the purpose must be and——

The Court: I think he can testify what was said there at the time, Counsel.

Mr. Walcom: Q. Will you tell us what was said in sum or in substance, Mr. Gamber, from the time Mr. Erickson came to you there, just what was said by you and by Mr. Erickson.

A. Well, it would be rather hard to describe everything you did. I don't believe my recollection would serve me that way.

(Testimony of Val Gamber.)

The Court: Mr. Gamber, this is an agency that does business in Sears & Roebuck?

The Witness: That is right. [104]

The Court: This is a Sears & Roebuck store?

The Witness: Yes, sir.

The Court: You have a little booth?

The Witness: That's right.

The Court: At the store, you are behind a booth and people come up and make applications for insurance?

The Witness: That's right.

The Court: Is that the way they normally do in every Sears store?

The Witness: Right.

The Court: Do you have any recollection of a particular conversation with this plaintiff?

The Witness: No, sir, other than our normal way of doing business, and the first thing we ask an individual is if they have had insurance cancelled or refused; if they have it is then necessary to put them on assigned risk if they cannot secure insurance through other means, and had I known at the time——

The Court: Those are the instructions you get?

The Witness: Yes, that is Company procedure, yes, sir.

Mr. Walcom: Q. At the base of that form which you have, both in the plaintiff's Exhibit before you, and in the original, there is a portion there which says "Binder" and "Non-Binder", isn't that correct? A. That is correct. [105]

(Testimony of Val Gamber.)

Q. Now, the "Binder" says that: "Subject to the conditions on the reverse side, the Company hereby binds the insurance applied for, to become effective at 6:05 p.m., 12-17-52." Is that correct, sir?

A. That is correct.

Q. What is the meaning of the term "Binder", Mr. Gamber?

A. The Company is on the risk at that particular time.

Q. In other words, the risk attaches immediately? A. Yes, sir.

Q. What is the significance of "Non-Binder", which is crossed out, which was not completed on that occasion?

A. "Non-Binder" means that the application is made under writing and isn't approved until after the investigation is made.

In other words, we would write an application on him, a Non-Binder, if there is anything unusual or something undesirable about the risk, that would be entirely an underwriting matter.

Q. Are you permitted to bind insurance if you are informed that there has been a refusal or cancellation of previous existing insurance?

A. No, sir.

The Court: You received such instructions?

The Witness: Yes, we have, sir.

The Court: From your superiors?

The Witness: That is right.

Mr. Walcom: Q. Mr. Gamber, in addition to the information on the face sheet of this page, which is

(Testimony of Val Gamber.)

exactly the same as the plaintiff's exhibit, we have a reverse questionnaire, and I will ask you whether or not all of that information contained in there—tell us how is it obtained?

A. Well, there is a series of questions which we normally ask each individual. That generally follows down the line, Question 1, Question 2, and so on. We ask a question, wait for an answer. After we do get an answer we insert the answer in the space provided for the answer.

Q. Just to expedite this, everything in this questionnaire, did you get that information from Mr. Erickson? A. Yes, sir.

Q. Now, how about this item—well, first of all, it says: "Applicant. Swedish." Where do you get that information? A. Mr. Erickson.

Q. Down here——

The Court: Now, wait a minute. Do you recall that?

The Witness: Evidently, Your Honor. Everything that I have asked him, the answers came from Mr. Erickson himself. [107] There would be no other person there to tell me whether he is married or anything about the applicant other than him, himself.

The Court: Well, actually remembering the incident, you don't recall this at all?

The Witness: Yes, it is so far back it is difficult to recall everything that was said. All I can go by is what my application has here to offer. Incidentally, you get into—you do things a certain

(Testimony of Val Gamber.)

way, we do them for years and years and just follow that particular pattern.

Now, as far as questions and answers are concerned, we ask him each question because it is a company policy that we do that. In this case I did the very same thing as I do. There is reasons for that, reasons that would be beneficial to me as well as to the company.

The Court: All right. All right, go ahead.

Mr. Walcom: Q. Mr. Gamber, you did, for instance, ask him for his driver's license number, did you not? A. Yes, sir, I did.

Q. And copied the number given you?

A. That is correct.

Q. You asked him the name of his previous insurance carrier, did you not? A. I did.

Q. And you got the number of that policy?

A. I did.

Q. Did you get the expiration date of it?

A. I did, it is listed 12-18-52, for 17 years.

Q. Had been insured with State Farm for 17 years. Now, in addition to that, you prepared——

The Court: Mr. Gamber, where did you get the number of that policy? Did you see the policy?

The Witness: Well, Your Honor, people carry identification cards issued to them by various insurance companies—we do the same—and as to whether it was written on a scrap of paper, whether it came from an identification card, I don't recall, but I must have gotten the number from some identifying certificate of some sort or I wouldn't have

(Testimony of Val Gamber.)

listed it on the application, I would have left it blank and let the company make their own investigation.

Mr. Walcom: Q. In addition to completing this questionnaire which I think at this time, if the Court please, I will ask be admitted as Defendant's exhibit next in order.

Mr. Friedman: On the questionnaire now?

Mr. Walcom: Questionnaire and the original of Plaintiff's Exhibit 3.

The Court: Isn't it already in evidence?

Mr. Walcom: The questionnaire is, Your Honor, but does that bear the questionnaire on the reverse?

Mr. Friedman: I would like to ask him some questions on [109] voir dire on this questionnaire, Your Honor. The only document received by the plaintiff here is the copy, but not what is on the back, and this is a copy of a document contained in their records that has writing on the back that the plaintiff has never even seen.

Mr. Walcom: The plaintiff, counsel, gets the copy, it is in triplicate. That is the copy they keep, the questionnaire, the client gets the conditions respecting binder and non-binder conditions of coverage.

Mr. Friedman: I understand that, but let me ask some questions, we have never seen it before today.

Mr. Walcom: Yes, you have, Counsel.

The Court: Let me see what you are offering now that isn't already in evidence?

(Testimony of Val Gamber.)

Mr. Friedman: It is the back of that that they have in their possession.

Mr. Walcom: Questionnaire, Your Honor.

Mr. Friedman: It is the third copy.

Mr. Walcom: On the reverse of that.

Mr. Friedman: It says at the bottom, "Branch Office Copy."

Mr. Walcom: That is the third white.

Mr. Friedman: It isn't the applicant's copy.

Mr. Walcom: It says applicant's copy.

Mr. Friedman: It can't be, this is the applicant's copy. [110] There is your branch office copy, see?

Mr. Walcom: That is right, that is the one going in.

Mr. Friedman: Yes, that is what I am objecting to.

The Court: Is this a fair statement of it, Mr. Gamber, that this back of this questionnaire is in your handwriting?

The Witness: Yes, sir, it is.

The Court: And after you asked the applicant, Mr. Erickson, certain questions, which you do not now recall, isn't that correct——

The Witness: That is correct.

The Court: ——you filled in the back of this questionnaire?

The Witness: No, sir, I filled in the questionnaire as I am asking the questions.

The Court: All right. But I say, you don't recall the particular questions, but the information was

(Testimony of Val Gamber.)

given you by Mr. Erickson and you wrote the answers on the back?

The Witness: That is correct.

The Court: The exact detail of what you asked him now, I take it, you don't remember?

The Witness: I would ask as the question itself states on the application, then I would insert the answer—have you had any accident or loss in the last so many years, and so on—you would enter in there the age of the youngest driver of the vehicle, who is the other driver, other [111] principal, and naturally he named his wife and age, and her driver's license and so on, insured by any other company. Naturally we, in this case it was State Farm, and what is the policy number, and when that policy expires. We ask all that information as we go down the list. Then if there is any remarks relating to the application we feel would be helpful, expedite the application, we make other remarks to the underwriting department, which is down here.

The Court: All right, this is filled out by you at the time you are talking about?

The Witness: That is correct.

Mr. Walcom: And then, Mr. Gamber, you got instructions on how to reach him at the address in Booneville, where you get off, the bus driver and the like, with which we are not concerned, and the car, the record of the—nature of the car and its condition? A. Yes.

Q. Then did you prepare a memorandum which

(Testimony of Val Gamber.)

is attached here and which I will show to counsel as well.

Mr. Friedman: Well,—

Mr. Walcom: Q. I will ask you whether or not you prepared this memorandum attached to this application, which is the fourth sheet attached to this application? A. That is my writing.

Q. And in that you wrote— [112]

Mr. Friedman: Now, just a moment, I must object to that document.

The Court: I don't see—

The Witness: That is an explanation to the underwriting department depicting the highlights of the application, why I thought it was an acceptable risk.

The Court: When is this made out?

The Witness: At the same time, before I sent my application in; that would be that evening.

The Court: After the customer left?

The Witness: After the customer would leave.

The Court: And you take the application that you have and you extract from that certain information?

The Witness: That is right.

The Court: That is in this information and you put it on down here? (Indicating)

The Witness: That is right.

The Court: That is done sometime later that evening?

The Witness: That is right.

The Court: Before you close?

(Testimony of Val Gamber.)

The Witness: That is correct, sir.

The Court: I don't believe that would be admissible, Counsel.

Mr. Walcom: Very well, Your Honor. Well, then, may I submit the first sheet with the questionnaire, if the Court [113] please?

Mr. Friedman: I want to enter an objection to the admission of that document on several grounds. One, on its face it states that it is branch office copy, it is not a copy delivered to the plaintiff here, plaintiff has never seen it to this day. It just says that third document, which Your Honor has seen fit to exclude from evidence, is purely for the purposes of their own office information and records.

The Court: I think it goes beyond that, counsel. I think it is admissible. In other words, this is done and introduced now for the purpose of refreshing his recollection. He has had a number of transactions, he said these were made out at the time and for the purposes of refreshing his recollection as to his conversation with Erickson.

Now, the other document is in a different category, that is the reason I excluded it, that was made while Erickson was not there, but at a later time.

Mr. Friedman: May I ask some questions on the document itself as to how he happened to complete it?

The Court: Which one?

Mr. Friedman: The one that is being offered that Your Honor feels may be admissible.

The Court: Yes, you may. [114]

(Testimony of Val Gamber.)

Voir Dire Examination

Mr. Friedman: Q. How many of these do you do a day?

A. Rather difficult to say. I can tell you approximately how many we do a week, more familiar,—

The Court: How many a week?

The Witness: I would say on the average of 14 to anywhere—18 a week.

Mr. Friedman: Q. As a matter of fact, at the time you were doing this, were there other people at the counter also securing insurance?

A. I don't recall that.

Q. And you don't know how you got the number of the policy, you say, that is on here?

A. No, I don't recall whether he had a slip of paper or how I got it.

Q. How long have you been doing this work?

A. Two and a half years, sir.

Mr. Friedman: I have no other questions, Your Honor.

The Court: All right.

Mr. Walcom: May we have that marked, if the Court pleases?

The Court: It may be marked.

(Whereupon questionnaire and original application were received in evidence and marked Defendant's Exhibit D.) [115]

Mr. Walcom: That is all. You may cross-examine, Counsel.

Mr. Friedman: I have no other questions, Your Honor.

(Testimony of Val Gamber.)

The Court: All right, you may be excused.

Mr. Walcom: Yes, you may step down, Mr. Gamber.

(Witness excused.)

Mr. Walcom: Call Mr. Wood.

FRED WOOD

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

Mr. Walcom: Q. You are Mr. Fred Wood?

A. Yes.

Q. What is your address, Mr. Wood?

A. The business address is 321 Middlefield Road, Menlo Park.

Q. What is your business or occupation?

A. Underwriting Manager for Allstate Insurance.

Q. How long have you been employed by Allstate Insurance Company?

A. Be five years November 14.

Q. And is it your province in your official capacity as Underwriting Manager to pass upon the desirability of risks? [116]

A. Yes.

Q. And your Company, does it have certain procedures in the procuring of applications for insurance?

A. Yes.

Q. Now, I will show you, Mr. Wood, an application form which is the Defendant's Exhibit D and

(Testimony of Fred Wood.)

ask you to look at it, sir. Do you recognize that form? A. Yes, I do.

Q. In the left-hand portion of that form, there is a question: Have you ever had insurance refused or cancelled, you or a member of your family, within the last two years. What is the purpose of putting that provision in that form, Mr. Wood?

A. To mainly weed out undesirable applicants.

Q. Is there any regulation permitting your solicitors or agents to bind coverage if those answers, rather, if those questions are answered affirmatively?

A. Yes, Allstate's agents cannot bind an application where the applicant has had a prior insurance cancellation or a license suspension, not allowed to.

Q. In your capacity as an underwriting manager, do you consider it material whether or not the applicant has had a cancellation of previous coverage extended to him or a refusal of coverage?

A. That and the license suspension probably are the two most [117] important questions on the application. It is usually a sure-fire thing that the applicant is undesirable if he has had a license suspension and prior cancellations from another company.

Q. You have told us that the Agent cannot bind coverage if those questions as to revocation, with which we are not concerned in this particular instance, but where that cancellation question is answered affirmatively, he cannot complete the binder

(Testimony of Fred Wood.)

portion? A. He cannot complete the binder.

Q. In other words, if he had those questions answered affirmatively, could he complete the non-binder portion?

A. Yes, if either question is answered on the "yes" side, the agent may submit the application to underwriting on a non-bound basis, no coverage is in force, allowing the underwriting department to make a full investigation to determine whether they would want to issue a policy or not.

Q. That is distinguished from the binder provision in that where the binder exists, the coverage takes place immediately, isn't that correct?

A. That is correct, it has an effective date on the binding portion.

Q. I see. Now, then, I have withdrawn that particular document from this underwriting file, but is it on the basis of that application that a policy was issued in this particular [118] case to Mr. Erickson? A. Yes, it was.

Q. And would you in fact have issued a policy to this gentleman if in truth and in fact there had been information in that application that he had insurance coverage cancelled or refused to him within two years preceding that application?

A. No.

Mr. Walcom: Thank you, sir. You may cross-examine.

Mr. Friedman: Your Honor, may I see the policy itself?

(Testimony of Fred Wood.)

Cross Examination

Mr. Friedman: Q. Mr. Wood, how long have you been an insurance underwriter?

A. Five years.

Q. And you are familiar with the practices of insurance companies and checking of application forms, questions and so forth?

A. I am familiar with Allstate's practice.

Q. Allstate's practice only?

A. Not only, but more familiar, naturally, being an employee.

Q. Don't you ever write letters of inquiry to other insurance companies relative to that man's insurance status with that particular company?

A. Yes, we do. [119]

Q. And having this particular number of a policy and the company, it would be, would have been very easy for you to have written a letter of inquiry or get them on the phone and find out the status of Mr. Erickson as far as his insurance went with Allstate?

A. There would be no necessity of it. Mr. Erickson stated he had not had a cancellation, never had an accident.

Q. All right. When do you have a cancellation under your policy?

A. Would you restate that?

Q. When do you have a cancellation—I will read the cancellation clause under your policy.

“Cancellation: The named insured may cancel

(Testimony of Fred Wood.)

this policy by mailing to Allstate written notice***” and so on, skip some of this.

“If Allstate cancels,”——

“Allstate may cancel this policy by mailing to the named insured at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective.”

You are familiar with that clause, aren't you?

A. Yes.

Q. Now, assume you send that notice that I have described in this policy; when is there a cancellation as far as you [120] know under your terms of your own policy?

Mr. Walcom: Just a moment——

Mr. Friedman: Just a moment.

Mr. Friedman: Q. Is it the date you send the letter or the date set forth in the notice for the date of cancellation?

Mr. Walcom: Just a moment. If the Court please, I will submit it is incompetent, irrelevant and immaterial. It isn't Allstate's cancellations of the policy that was cancelled here, it is that of the State Farm Mutual.

Mr. Friedman: No cancellation here at all, Your Honor.

The Court: I think the objection may be sustained.

Mr. Friedman: Q. As a matter of fact, you don't have any cancellation under—Put it this way: You are an underwriter and familiar with these

(Testimony of Fred Wood.)

policies, aren't you? You know what cancellation means, don't you? A. Yes.

Q. You don't have a cancellation, do you, of any insurance policy until the date set for cancellation, do you?

A. Unless there is a breach of warranty, as in this case.

Q. Answer the question. Do you have a cancellation of a policy until the date set for cancellation?

A. If there isn't a breach of warranty and if we cancel the policy, we allow the insured ten days written notice, if we decide to terminate a risk because he is undesirable. [121]

Mr. Friedman: That isn't the question. I move to strike that, Your Honor.

The Court: I think it is all right, he has answered, and I don't believe that it is proper to ask him. This isn't cross-examination of what he went into as to certain phases of the Allstate policy. Now, that isn't the one we are talking about, it is the cancellation of the State Farm policy, isn't it?

Mr. Friedman: Yes, and the whole point of the case is there is no cancellation, and this man is supposed to be an expert on the subject, and I am asking him as an expert when he has, when he deems a policy to be cancelled. He says that they won't sell under this particular representation, that if there is a statement there is no cancellation, they won't sell. The question is, when is it cancelled.

The Court: Isn't that what the Court is supposed to decide?

(Testimony of Fred Wood.)

Mr. Friedman: I suppose so, yes. That's right. All right. I have no other questions.

The Court: That is all.

Mr. Walcom: You may step down, Mr. Wood. Is Mr. Gordon in the court room? Will you step up?

AL GORDON

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

Mr. Walcom: Q. You are Mr. Al Gordon?

A. Yes, sir.

Q. (Spelling): G-o-r-d-o-n?

A. Yes.

Q. Where do you live, Mr. Gordon?

A. 722-20th Avenue, San Francisco.

Q. What is your business or occupation?

A. Used car manager, Ansel Schloss.

Q. Were you in such employment, sir, in 1953, particularly in the month of March and thereafter?

A. Yes, sir.

Q. Been working there all along?

A. Yes, sir.

Q. Mr. Gordon, you are familiar, no doubt, with a car belonging to Mr. Oscar Erickson, which was in the Schloss establishment?

A. Yes.

Q. In 1953, were you, sir?

A. Yes, sir.

Q. Can you tell us what, if anything, has ever become of that [123] car?

(Testimony of Al Gordon.)

A. I sold that car two weeks ago.

The Court: What?

The Witness: I sold it two weeks ago, Your Honor.

Mr. Walcom: Sold it two weeks ago?

A. Oakland—the Oakland Automobile Auction.

Q. At the Oakland Automobile Auction?

A. Yes, sir.

Q. Could you tell us what amount was received for the car? A. \$493.00.

Q. Now, that car was sold to satisfy a garage-man's lien, sir, is that right? A. Yes, sir.

Q. Are you familiar with a lien on a car by dealers and the like? A. Yes, sir.

Q. You know that a lien for repairs is no good over the statutory \$100 unless authorized by the owner of the car, isn't that true?

A. Yes, sir.

Q. The repairs of this car were authorized by the owner, sir?

A. That part I couldn't tell you, sir.

Q. You wouldn't know?

A. That was out of my department. [124]

Q. That was out of your department?

A. Yes, sir.

Q. Do you know what the amount of repairs were? A. I believe around \$1100.

Q. Around \$1100? A. Right in there.

Q. And that was as of the time it was completed in 1953, is that correct? A. Yes, sir.

Mr. Walcom: May I see that first exhibit for

(Testimony of Al Gordon.)

identification, if the Court please, the Schloss repair bill?

Mr. Walcom: Q. I will show you, Mr. Gordon, a repair bill from Ansel J. Schloss, Mr. Oscar Erickson, Box 182, Booneville, California, Studebaker Model H, I guess that is, March 10, 1953, \$1117.55, is that correct? A. Right.

Q. Now, could you tell us, in your capacity as a used car sales manager, what, at the time, what was the value of this car, say, in February or in March of 1953, what was the going market value of a 1951 Model H Studebaker Sedan?

Mr. Friedman: I am going to object. We are speaking of a particular car. This man has never seen this car as of that time, not qualified to give his opinion as to its value at that time.

The Court: Oh, I think the objection goes to the weight, [125] if he can testify of his opinion of a car of that model and year, and I don't know whether you are talking about before or after the wreck, Counsel.

Mr. Walcom: No, I will qualify it. I think, Your Honor, that it should be the value of the car before the wreck, because in a wreck there will be a depreciation incident to the particular vehicle, so I will ask——

The Court: Are you familiar with this model number?

The Witness: Yes, Your Honor.

The Court: Studebaker, 1951. All right, go ahead.

Mr. Walcom: Q. And could you tell us what its

(Testimony of Al Gordon.)

value would be as of March of 1953, Mr. Gordon, if it hadn't been in this wreck?

A. If it hadn't been in the wreck?

Q. Yes.

A. I'd say in the neighborhood of around \$1100.

Q. About \$1100? A. Yes, sir.

The Court: What value is that, Mr. Gordon? Is that a retail value, wholesale value, or what is it?

The Witness: Your Honor, it is the retail value.

The Court: Retail value.

Mr. Walcom: Brought in off the lot.

The Court: The blue book value of the car at that time—do you have the blue book value of the car as of that time?

The Witness: The blue book, the wholesale or retail? [126]

The Court: You have heard of the blue book?

The Witness: Yes, sir.

The Court: Are you familiar with the blue book value of that car as of that time, both retail and wholesale value as shown by the blue book for that month?

The Witness: At that time I probably knew what it was; I haven't checked that far back.

The Court: You haven't looked it up recently?

The Witness: No, sir.

The Court: What?

The Witness: No, sir.

Mr. Walcom: Q. Your blue book is issued every quarter? A. Every two months.

Mr. Friedman: Your Honor,——

(Testimony of Al Gordon.)

The Court: They are available?

Mr. Friedman: I don't think this is admissible.

The Court: I believe this testimony is inadmissible. He states now he doesn't know. He has testified in his opinion about \$1100, but I was cross-examining on that opinion and I would like to know what the blue book shows.

Mr. Walcom: I am sure we could supply that to Your Honor. But those blue books change.

Mr. Walcom: Q. You, of course, see them currently for the period in which they are intended, is that correct? A. Yes. [127]

Mr. Walcom: I think that is all, Mr. Gordon.

You may cross-examine.

Cross Examination

Mr. Friedman: Q. Mr. Gordon, you say in your opinion if it hadn't been in a wreck it would be worth \$1100, is that right?

A. That is right.

Q. Your repair bill is \$1132? Is that correct?

A. Yes, sir.

Mr. Walcom: \$1117.

Mr. Friedman: Q. \$1117? A. \$1117.

Q. So your company charged more for repairing it than you say the car was worth, is that right? I don't get your answer; is that "yes"?

A. Yes, sir.

Q. As a matter of fact, this sale you are talking about, the car being sold at auction last week, is

(Testimony of Al Gordon.)

the third time this car has been sold to somebody, isn't that right, by Ansel Schloss?

A. Not that I know of.

Q. Or the second time, which is it?

A. Not that I know of, sir.

Q. It hasn't been sold before? [128]

A. I sold the car at Oakland—I sold the car at the Oakland Automobile Auction two weeks ago.

The Court: The Oakland Automobile Auction is what?

The Witness: It is a wholesale auction.

The Court: It is a wholesale auction for dealers?

The Witness: For dealers only.

The Court: For dealers only. Okay.

Mr. Friedman: Q. As a matter of fact, this car has been sold at least twice, or possibly three times, and returned by the buyer each time because they didn't want it because the frame was so bent that they couldn't use it, isn't that true?

A. Not that I know of, sir.

Q. Did you see this lien notice that was sent that the car would be sold in January of this year, of 1954?

Mr. Friedman: Where is that lien notice?

The Court: I am not very much impressed by the fact it was sold a couple of weeks ago for \$400. Counsel. It doesn't give me much idea of what it was worth in March of 1953.

Mr. Friedman: Just a moment, Your Honor.

The Court: All right.

Mr. Friedman: Q. Your Company does quite

(Testimony of Al Gordon.)

a bit of repair work for cars sent by Allstate, isn't that true?

A. I believe they do, sir. I am out of that department, and [129] I don't know.

Q. I understand. Therefore, when you testify here, called by the attorney for Allstate, you want to help Allstate, don't you?

Mr. Walcom: Now, just a moment.

The Court: That goes to the weight, Counsel.

The Witness: No, sir, I am not trying to help anybody.

Mr. Friedman: Q. Do you know whether this car was sold pursuant to this notice dated the 11th day of December, 1953, sent to Mr. Erickson, indicating that it would be sold on the 6th day of January, 1954 at ten o'clock a.m., at 49 South Van Ness Avenue? Do you know it was sold pursuant to that notice or not? A. No.

Q. You don't know that?

A. No, sir, it was not sold.

Q. It wasn't sold?

A. It was sold on our lot by auction.

Q. Only two weeks ago?

A. No, when it was first sold for the lien.

Q. When was that?

A. That, sir,—I haven't got the date, we have it in our office.

Q. Somebody bought it at that time, did they?

A. Yes, we bought it—I bought it. [130]

Q. You bought it? Did you sell it again?

A. I sold it two weeks ago.

(Testimony of Al Gordon.)

Q. That is the first time since? A. Yes.

Q. You couldn't sell it up to that date, the date you——

A. Well, you could, but tried to get too much money for it.

Q. What were you trying to get for it?

A. \$1095.

Q. Up until two weeks ago? A. Yes.

Mr. Friedman: Thank you.

Mr. Walcom: That is all, Mr. Gordon. You may step down, sir.

(Witness excused.)

Mr. Walcom: At this time, if the Court please, I would like to have this file of Ansel Schloss, heretofore marked for identification purposes, to be an exhibit on behalf of the defendant.

The Court: What is that?

Mr. Walcom: It is the file of the repair bill, if the Court please, and there is a letter here of Francis T. Walsh who represents, apparently—yes, he represents Ansel Schloss.

Mr. Friedman: An awful lot of stuff.

The Court: What is the purpose of it, Counsel?

Mr. Walcom: Well, some of it for this purpose. Your Honor, here is one letter of April 2, 1953, referring to the order for the repairs given by Mr. Erickson from Allstate Insurance Company, and two other documents here are copies of correspondence to Mr. Erickson.

The Court: I am not going to admit those, deny it on that basis, Counsel.

Mr. Walcom: Very well, Your Honor.

Call Mr. Daly.

WILLIAM DALY

was called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Court: State your name, please.

The Witness: William Daly, (spelling) D-a-l-y.

Direct Examination

Mr. Walcom: Q. Where do you reside, Mr. Daly? A. Redwood City.

Q. What is your business or occupation?

A. Claims Manager for the San Francisco Office of Allstate Insurance Company.

Q. Was that your employment, Mr. Daly, in February and March of 1953? A. It was.

Q. Were you in charge of the handling of a claim for collision and for medical payments presented by your insured, a Mr. Oscar Erickson?

A. I was.

Q. Could you tell us, first of all, Mr. Daly, approximately when it was you received notice of any loss suffered by Mr. Erickson?

A. May I look at the file?

Q. Certainly. You can see the file. Make it available to Mr. Friedman, too.

A. I would say that the first notice came to one of our adjusters, Mr. Pond when he was in Santa

(Testimony of William Daly.)

Rosa, and I would assume it is a Tuesday, that is our normal day for going to Santa Rosa.

Q. That was on what date?

A. I would say it was probably—I may be wrong—December the 17, because the accident happened on the 15th, which I believe was a Sunday.

Q. February 15th? A. February 15th.

Q. February 17th, was it?

A. February 17th; I am sorry.

Q. What was next done, Mr. Daly; to whom was it referred for handling?

A. Well, Mr. Pond was in Santa Rosa, and since the accident [133] happened a distance beyond which we would normally handle claims ourselves, we assigned it to an independent adjuster by the name of Reed & Corippo in Ukiah for handling. Mr. Pond phoned Reed & Corippo.

Q. Does the file reveal when they were able to get to this automobile?

A. We have a letter dated February 20 in the file from Reed & Corippo, saying this loss was reported to the office February 17th, 1953, by your Mr. Pond from Santa Rosa.

Q. Do you know whether or not Mr. Corippo was ever personally able to talk to Mr. Erickson?

A. That I don't know from the file. I don't know if he was or not.

Q. The file doesn't reveal that?

A. That's right.

Q. Now, this car was removed from the vicinity of the accident?

(Testimony of William Daly.)

A. Our file would indicate it was, I think the Burke Motors in Fort Bragg.

Q. Was it removed from that place?

A. It was removed from Burke Motors by the Civic Center Towing Service to Ansel Schloss.

Q. On what date? A. March 2, 1953.

Q. All right. Now, at the time which adjuster, if any, in [134] San Francisco, was handling the actual transactions regarding the car?

A. Mr. Pond was the material damage adjuster who was to adjust the physical damage portion of the loss.

Q. Mr. Daly, is it your custom to make any investigation concerning the warranties, or the warranties made by an insured, after this insured has an accident and makes a claim?

A. It is company policy that when we have a total aggregate exposure of \$750 that we investigate the warranties on the insured's application.

Q. Now, was that done in this case, sir?

A. It was.

Q. Could you tell us on what date that was first undertaken?

A. On March 3. There is a notification in the file here that we sent a letter to the Department of Motor Vehicles in Sacramento requesting a check on the operator's license of Birdella Erickson, and on the same date we sent one of our own forms, a CL9 to our own underwriting department in Menlo Park which says to please check the file for the following information, the operator's license of

(Testimony of William Daly.)

Oscar Erickson, and the prior insurance carrier.

Mr. Walcom: Now, Your Honor, we will recall Mr. Wood to show whether that was received.

Mr. Walcom: Q. You requested the prior insurance carrier check be made through your Menlo Park underwriting headquarters. What information did you receive concerning that inquiry?

The Court: Counsel, aren't we taking a lot of time about this? They made an investigation. As a result of the investigation they wrote the letter of March 24.

Mr. Walcom: That is correct, Your Honor. I merely wanted to take Your Honor through the manner in which they learned there had been a cancellation where he said previously they had not.

The Court: Counsel, I used to represent some insurance companies, I have some idea of their procedure. They made an investigation. As a result of that they wrote the letter of March 24th. Isn't that the answer?

Mr. Walcom: That's it in a nutshell.

The Court: Isn't that right?

The Witness: That is right.

Mr. Walcom: Q. Subsequently in April, after you had first disclaimed in March, reserved your rights in March, then in April you disclaimed?

A. That is correct.

Mr. Walcom: Thank you.

That is all I have to say, Your Honor.

Mr. Friedman: I have nothing to ask. [136]

The Court: That is all. Thank you.

(Testimony of William Daly.)

Mr. Walcom: You may step down.

(Witness excused.)

Mr. Walcom: Is Mr. Pond here? Call Mr. William Pond.

WILLIAM POND

called as a witness on behalf of the defendant, and being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

Mr. Walcom: Q. You are Mr. William Pond?

A. That is correct.

Q. That is (spelling) P-o-n-d?

A. (Spelling) P-o-n-d.

Q. Where do you live, Mr. Pond?

A. Presently in Pedro Valley.

Q. What is your business or occupation?

A. I am material damage adjuster for Allstate Insurance Company.

Q. Were you so employed, Mr. Pond, in March of 1953?

A. I was.

Q. And in your capacity as material damage adjuster, so we'll all know what that term means, you investigate collision losses, is that correct, and the like?

A. That is correct. [137]

Q. In other words, you are not the type of investigator who goes out and get statements from witnesses in personal injury cases and the like, you handle damage to automobiles, is that correct?

A. That's right.

Q. You handle them in the sense that you make

(Testimony of William Pond.)

an estimate of the actual repairs to be made, is that correct? A. That is right.

Q. Now, calling your attention to a Studebaker owned by an Oscar Erickson at Ansel Schloss on or about that time, did you look at that car and make an estimate? A. I did.

Q. That car at Ansel Schloss, did you ever authorize repairs to be made on that car to be charged to Allstate? A. I lost you there.

Q. I say, did you ever authorize Ansel Schloss to repair that car and send the bill to Allstate?

A. We never authorized repairs.

Q. Did you make an estimate?

A. I did make an estimate.

Q. You did make an estimate of how much it would cost to repair, is that correct?

A. That is correct.

Q. And with whom did you deal up there? Was it Mr. Aiello? Apparently he was there. Do you recall who it [138] was?

A. The service manager at that time was Gordon Perry.

Q. Gordon Perry. In other words, you might tell the Court, because I am not quite certain just what your activities are, will you just tell us what you did do as far as Ansel Schloss and that car is concerned?

A. Well, after I was notified the car had been delivered to Ansel Schloss by the Civic Center Transport Service, I went down there and identified the vehicle as being a vehicle that was in the

(Testimony of William Pond.)

policy, by motor number and description, and then proceeded to make an estimate of the damage that had been suffered as the result of this upset.

Q. And was anything else done in the way of— did you tell Schloss that this was an Allstate loss, that you would pay for it, or did you have any conversation or anything like that with Schloss in regard to who should pay for that car or who should authorize repairs? A. No, sir.

Mr. Walcom: Thank you, sir, that is all.

The Court: Do you have any dates as to when this car was turned in to Ansel Schloss, Mr. Pond?

The Witness: I wouldn't have them. I believe this gentleman standing here with the papers might, he has a copy of my estimate that—

Mr. Walcom: It was taken there, Mr. Daly testified, on [139] March 2, if the Court pleases, and I think we can stipulate on that.

The Court: On March 2nd when you took it there, did you arrange to have it go to Ansel Schloss?

The Witness: I arranged for the transportation.

The Court: Yes. You told them to make an estimate of the repairs?

The Witness: No, I made my own estimate.

The Court: You made your own estimate. Ansel Schloss does business with Allstate in connection with repairing cars?

The Witness: They have, yes, sir.

The Court: And March 2nd, the time you had the car at Ansel Schloss and you made the esti-

(Testimony of William Pond.)

mate, that information that you had at that time was that it was a loss to be paid for by Allstate?

The Witness: That is right, Your Honor.

The Court: And it wasn't until later, sometime three weeks later, that you learned that there was a disclaimer of liability by the Allstate Company?

The Witness: That is right, Your Honor.

Mr. Walcom: I have no other questions.

Mr. Friedman: I have no questions.

Mr. Walcom: If the Court pleases, that is the defendant's evidence.

Mr. Friedman: I may have a little rebuttal, Your Honor.

OSCAR F. ERICKSON

recalled as a witness on his own behalf in rebuttal, being previously duly sworn, resumed the stand and testified further as follows:

The Court: I will say to both parties that I am not satisfied with the testimony on either side as to the value of this automobile. I have some ideas as to what testimony could be produced. I don't think either side has produced the best testimony as to the value of this car.

Now, it is pretty easy to get——

Mr. Walcom: Your Honor, may I suggest this——

The Court: You can get it by a five minute phone call to any lending agency that has a blue book. They could give you the blue book, the retail and wholesale, and that has some relation to its market value.

(Testimony of Oscar F. Erickson.)

Mr. Walcom: I purposely didn't bring the blue book because I thought it would be hearsay.

The Court: I think it has some relation to value. I don't say that that is a bible you have to follow definitely, but it does give some idea as to value.

Mr. Friedman: That is true, no question about it.

Mr. Walcom: We can procure that. I will undertake to get a blue book, if the Court please, for that period. [141]

The Court: If counsel between them would agree, just submit in a letter, for this particular model on the date of this accident, what the retail value was as shown by the blue book, the wholesale value as shown by the blue book. I think that gives some indication of value. I know there are times when the market is depressed and blue book values are not entirely accurate, but they do give some indication.

Mr. Friedman: I agree with the Court, it does give some indication of the value.

The Court: Here you have on one side the testimony of the plaintiff, who has a right to testify as to the value of his car, but who has no great experience, we will say, in checking the value of the car.

On the other side we have the testimony of somebody who claims he didn't look at the blue book and trying to remember what it was a year and a half ago.

Mr. Walcom: I will produce it for Your Honor.

The Court: All right, go ahead.

Mr. Friedman: The questionnaire is what I want.

(Testimony of Oscar F. Erickson.)

The Court: The questionnaire?

Mr. Friedman: The questionnaire, Your Honor. Here it is.

Direct Examination

Mr. Friedman: Q. Mr. Erickson, the Defendant's Exhibit D in evidence is a questionnaire from—and on it in reference [142] to a question, purportedly an answer given by you as to—I don't know what it is in answer to, "Applicant Swedish". Did you tell that man you were Swedish?

A. Not that I ever know about.

Q. Where were you born, Mr. Erickson?

A. I was born in the United States.

Q. Now, in reference to the number of the policy that is listed down here, 528848-B405, do you know how he got that number?

A. No, I don't.

The Court: Did you have an identification card with your policy?

The Witness: That—the identification card has no number on it, it just says the State Farm on it with—has no number, my number is on the policy.

The Court: You are sure of that?

The Witness: Yes, sir.

Mr. Friedman: Did you tell him you had an expiration date of December 18, the following day, on your Allstate Insurance?

Q. Will you repeat that?

Q. Did you tell this man at Sears & Roebuck that the expiration of your insurance was December 18, 1952, on your *Allstate* Insurance?

(Testimony of Oscar F. Erickson.)

A. No, sir. [143]

The Court: What did you tell him about that, do you recall?

The Witness: I didn't tell him that cancellation—I told him the cancellation date was the 27th. I did not say the cancellation date, I said it expired the 27th, is what I mean to say.

The Court: Didn't you tell him you wanted this insurance to be in effect right now?

A. That is right, the only way we could go to Mexico was—wanted a policy to take us to Mexico, our policy wouldn't take us there.

Mr. Friedman: Q. You didn't say "My other policy with *Allstate* expires tomorrow or today"?

A. No, sir.

Q. You didn't make that statement to him?

A. No, sir.

Q. Incidentally, was anybody else at the counter at that time?

A. Yes, there was another couple there right with us, writing almost the same time he wrote ours.

Q. Were they asking, were they being asked any questions by this man at the same time?

A. Yes, sir.

Q. Was there anybody else before you or behind you? A. That I don't recall. [144]

Mr. Friedman: I see. That is all.

Mr. Walcom: I have no questions.

The Court: That is all.

(Witness excused.)

Mr. Friedman: That is the extent of the plaintiff's rebuttal, Your Honor.

Mr. Walcom: Now, if the Court pleases, I would like to renew my motion. I don't know if Your Honor has had an opportunity to look at the case of *Allstate Insurance Company vs. Moldenhauer*.

The Court: No, I have not.

Mr. Walcom: It appears, if the Court pleases, in 193 Fed 2d, 663. That is a 1952 case arising in the Seventh Circuit.

Now, if the Court pleases, the testimony, without contradiction, is that when that application was completed by Mr. Erickson, he did not disclose that he had a notice of cancellation and/or a refusal to extend insurance coverage in that letter of December 15 from the State Farm Insurance Company, he admits that.

The testimony——

The Court: I don't want to stop you, Counsel, but I think we can limit this. I am fairly familiar with what the testimony is today, but there are certain points that I want to have some help on.

Mr. Walcom: What I am talking about particularly, Your [145] Honor, is that bearing that in mind, you have the testimony of Mr. Gordon and particularly that of Mr. Wood of the materiality of the information sought to be adduced in those questions. And it is uncontradicted, if the Court pleases, that it is material in their determination of whether or not a policy should issue to the applicant.

Now Counsel has brought up the issue here which

I think has been resolved in the Moldenhauer case in that he attempts to distinguish between a cancellation which is to take place ten days after the notice or thereabouts, as opposed to maybe the layman's idea of cancellation right here and now.

In the Moldenhauer case, in that action, and I quote from the Court's opinion on Page 664, this is a declaratory relief action in which Allstate was the plaintiff, Moldenhauer the defendant.

"* * * prior to the issuance of plaintiff's policy, Moldenhauer had been insured with the State Farm Mutual Insurance Company, which Company had, before plaintiff issued its policy, notified Moldenhauer that it was cancelling his insurance, * * * because of the number of small accidents in which he had been involved. Thus it clearly appears that Moldenhauer's declaration that no insurer had ever cancelled any automobile insurance which had been issued to him was false. [146] Based on these findings, the court concluded that the policy was null and void because Moldenhauer had failed to disclose material facts which increased the risk."

Now, we have not only that case, but Your Honor will doubtless be familiar with the California case of Allstate versus Miller, which is 96 Cal App 2d, Page 778. And in that case the representation was that he had not had a driver's license suspended. I mention this case, if Your Honor please, because it is the exact policy form that is involved, the same binder, the same story or pattern that follows, and the Court in that case held that in view of the testimony of the underwriter that this was a very ma-

terial matter that the question of the desirability of the risk depended upon the driver's history was most material in determining whether the policy should issue, that the company had a right to declare the policy void under the count of the breach of warranty.

Now, if the Court pleases, it is not a matter of intent in these things even, as the Courts have held, and I could quote you here—I am going to give you a citation in a moment—if the insurer is misled by statements that were made, it is immaterial whether the insured's omission to state the true facts were intentional or unintentional. That is the case of *Mirich vs. Underwriters at Lloyd's London*, [147] 64 Cal. App 2d, 522.

Our Insurance Code, in Chapter III, commencing with Section 330 of the Insurance Code, the effect of concealment and the neglect to communicate that which a party knows, and what to communicate to another which will affect the desirability of a risk, and that is concealment.

And it goes on to state further that concealment, whether intentional or unintentional, entitles the injured party to rescind.

Now, what is to be construed as material is defined by statute in Section 334:

“Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, informing his estimate of the disadvantages of the proposed contract, or in making his inquiries.”

Now, in view of those sections, if the Court pleases, it must be most clear and uncontradicted that Allstate Insurance Company would not have allowed Mr. Gamber to bind that coverage, it would not have issued the policy had it known that these representations—that he had been refused further coverage or that there had been a cancellation. Of course not. This policy would not have been issued. As Mr. Gamber explains, he might have written a non-binder, [148] merely an application which would require the underwriting department to investigate and then determine if it wanted to cover the man; or, as he said, if he couldn't get coverage, go as an assigned risk.

So I don't think, if the Court pleases, under that Moldenhauer case particularly, which is most like this in every respect, that there is any question. A man admits that he concealed that information. He knew it. He talked to his agent. He knew of his history, and why he was being cancelled. And it seems to me a distinction without a difference to try and say just because he got the notice he was being cancelled, although the effective date was some ten or twelve days hence, that he is entitled to have a mental reservation and say he had never been cancelled. The fact is that was a matter which should have been communicated, because it would affect, as 334 says, the conduct of Allstate Insurance Company as to whether or not it was to issue that policy.

Now, further than that, if the Court pleases, you have the very terms of the policy itself, you have

that application which says subject to the terms of the policy, and particularly the reverse portion of that form which the gentleman obtained when he signed his application, namely, that—that section says:

“Any insurance bound hereunder shall otherwise [149] be subject in all respects to the terms and conditions of the regular policy form of the company at present in use and to the statements in this application.”

And again that is reiterated in the insuring clause of the policy. It is reiterated again in the supplement page where again the question is asked, or at least is declared that during the last two years there has not been a refusal or cancellation. And again in the conditions, No. 1:

“By acceptance of this policy the named insured agrees that the Declarations on the supplement page are his agreements and representations, and that this policy embodies all agreements, relating to this insurance, existing between himself and Allstate or any of its agents.”

Now, I say to this Court that there is not any contradiction. I would be happy if Your Honor had any questions that you might wish to present to me.

I can't see that there is anything here other than a clear demonstration of a breach of warranty, a withholding of information which caused Allstate to issue that policy when it never would have been issued had the truth been before it, and it is not concealment of any minor thing, it [150] is concealment of a most material thing which occurs to an

underwriter, as we learned from Mr. Wood, namely, the desirability of the risk. I submit there is no evidence here which overcomes that demonstration of materiality and concealment by the plaintiff which caused the preparation of this policy. It was fraud from the beginning because there was never a contract, never a meeting of the minds. This policy could never take effect because there had been a misrepresentation at its inception. I submit to Your Honor that is the State rule in the California case, and the Moldenhauer case is the Federal rule on that, and that Your Honor should grant us a judgment or a dismissal of this action.

The Court: What about the question, while you are there, the question of jurisdiction. Here is the question that arises in my mind. Let us assume that the claim, as it does in this case, asks for a figure in excess of the \$3,000. The proof to the Court might justify an amount less than \$3,000. That is, assuming all other things in favor of the plaintiff for the moment. The mere fact that the proof comes to less than \$3,000; does that bar it for lack of jurisdiction?

Mr. Walcom: My understanding of the rule, Your Honor, is that it is a question of good faith, that if I came in before Your Honor alleging a personal injury, let us say, [151] and Your Honor awarded me \$2950, you would not, in that instance, if you were satisfied I sought this sum in good faith, you would not deprive me of the jurisdiction of the Court. That is my understanding of the rule.

Am I correct, Counsel?

Mr. Friedman: I think that is approximately right.

Mr. Walcom: But I submit in this case we raised this question of jurisdiction from the very inception by motion to dismiss immediately on the filing of the complaint because of the liquidated amount of the damages, easily demonstratable and he knew what the loss or bill was at the very time the accident occurred, he knew what those bills were thereafter. There is one here that comes even two or three months after the accident, so they were readily demonstratable and known to him.

However, I think, if the Court pleases, my further understanding of the rule is that in the event Your Honor should find that the defendant should prevail, that I believe Your Honor has the right to accept the prayer in the complaint for the purpose of rendering that judgment. I am frank to confess I do not practice much in Federal courts, if the Court please, and I do not profess to be an expert on them.

The Court: All right.

Mr. Friedman: On the question of jurisdiction, because counsel had raised that in the previous motion, I did do a [152] little research, and he has substantially stated the rule, that is true. If the complaint on its face sets forth a cause of action which jurisdictionally as to amount is sufficient to come within the province of this Court and it appears to be generally in good faith, even though the evidence demonstrates a lesser amount, the Court may give

a judgment for a lesser amount and will have jurisdiction.

Moreover, the cases also hold, if the Court finds on the jurisdictional matter alone as to amount, that that is the only reason for dismissing the case, not to the issue in connection with the question whether or not there was a cancellation, a misrepresentation as to cancellation, the Court then should state that it is those grounds, that it is dismissing on that basis, because it doesn't, there isn't sufficient amount jurisdictionally in the complaint. The cases that hold that are *Scott vs. Penn Railroad Company*, 8 FRD 548, and *Topping vs. Fry*, Seventh Circuit, 147 Fed 2d, 715. That case is lack of jurisdiction and dismissal by the Court on that ground and not on the merits. The Court should indicate that is the reason, on the ground of insufficient amount. The courts have held an amendment of a complaint permissible instead of dismissal. If there is any way of saving the action, the Court will, on amounts that the plaintiff can show the Court that they really have that amount, the Court may permit an amendment to the [153] complaint, which is the foundation for the Court's jurisdiction, rather than the evidence which will be produced, sometimes which may not be equal to the amount claimed. The case that will support that position——

The Court: I didn't understand you, Counsel.

Mr. Friedman: The point there is, Your Honor, as I did in this case, I moved to amend the complaint when we started and asked the Court's per-

mission to set forth answers to the interrogatories increasing the amount of the damage.

The cases have held that where it appears the complaint may be defective as to jurisdictional amount that the Court will permit, if possible, to save the action. In other words, the policy is to save the action on the grounds of jurisdictional amount, if it is possible, rather than to throw it out of the Court.

The Court: Your complaint here states an amount in excess.

Mr. Friedman: It does, and the complaint is the foundation.

The Court: There wasn't any necessity to amend the complaint.

Mr. Friedman: I stated the value to be \$2,000, and I amended it to \$2300. That is the purpose we have amended it, and then also in the answer to interrogatories. We didn't [154] have the bill, we didn't have the amount claimed as damages for the \$700, nurse's bill, and I asked the Court's permission to include that as an answer to the interrogatories, which would come within the \$2,000——

The Court: What was the advantage of the Federal court in this case?

Mr. Friedman: What was it, Your Honor?

The Court: What was the motive for being in the Federal Court in this case?

Mr. Friedman: In this case—As a matter of fact, it hasn't been revealed to the Court, Allstate brought an action for declaratory relief in Santa Rosa in the State court, and I had that action dis-

missed on the ground that wasn't the proper action to bring, that I have decisions of the Court up here, don't want to burden the Court, but that the proper action was an action by the insured against Allstate and that they should raise that as a defense, and that Court up there found that to be—I researched the law pretty carefully on that, and I have a decision here, if the Court will bear with me a moment, bring out the decision. In the State court, Allstate's action for declaratory relief in Santa Rosa—and that is why I brought it to San Francisco, I brought it to San Francisco for my own personal convenience, in the Federal District Court——

The Court: Why not in the State Court? [155]

Mr. Friedman: Well, I think I might have had to go back to Santa Rosa. So I believe, in good faith, that the amounts at that time were jurisdictionally correct, it was not brought in bad faith, brought in good faith, but I wanted it in this Court because it would have been, as I researched the law that follows, I might have to go back to Santa Rosa and bring an action against Allstate in Santa Rosa.

The Court: Now, another question, on the cancellation question do you have any authorities?

Mr. Friedman: At this point I don't. In view of Counsel's authorities, I would like the opportunity to read them myself, submit it as a brief, if the Court will permit me to.

The Court: You don't have to have any argument, just submit the point and the cases.

Mr. Friedman: May I say this in passing, it properly is not in these cases, when we think of the

position of Allstate in this type of case, they are really in a very enviable spot. They write insurance rapidly, I will say almost carelessly, accept applications, numerous applications, take a man's premium or countless premiums, and if there is no accident, to pocket it. As soon as there is an accident, then they make a very careful survey and search an underwriting investigation to find out every possible way they can to defeat payment.

One of the witnesses testified he is an underwriting man working for Allstate, working for them for five years. He has the number of the policy of Allstate (sic), he has the Allstate Insurance Company (sic) involved, it is revealed to them. Not a single attempt is made to find out a thing about coverage or lack of coverage or whether Mr. Erickson has been thrown out, but when there is an accident on February 15, three or four months later—they don't do anything about it, his car is taken down to a garage in San Francisco on March 3, that is almost 18 days after the accident, brought into a garage in San Francisco, and they don't disclaim liability until sometime—the letter is there—don't disclaim it. March 14th is the first time they express a doubt to Mr. Erickson as to whether they can give him coverage. I say they are not coming into Court with completely clean hands. That is not real insurance. Protect themselves—and if these authorities really contend what Mr. Walcom says they do, how about the provision in the letter which says we will cancel, why don't they put in, it would be very easy to put in those representations,

say, "Have you ever had a notice or intention to cancel, or a cancellation or a refusal to take insurance." Now, they say, ever had a cancellation. They have great experts writing these policies, selling them all over the United States. They have all the cards in their hands. Protect themselves. It would be very easy. They make no [157] attempt to. They only pump the insured, when he has a claim, the only time they figure it out, say they have been defrauded.

I don't think they should be permitted to get away with that. If they really wanted the Courts to protect them and have the policies and write the policies, they could very easily insert that clause in their policy. And I feel they should bear the burden.

The Court: How long do you want to present these?

Mr. Friedman: About ten days, Your Honor.

Mr. Walcom: We could do it in less than ten days.

Mr. Friedman: Well, if Your Honor wants it faster, we can do it faster.

The Court: Well, a week or ten days, wouldn't make much difference between Friday and Monday. Make it ten days. That will be the 25th. And at the same time, will there be a letter in there indicating what the blue book value of the car was?

Mr. Friedman: As of that year?

The Court: As of that time.

Mr. Walcom: Your Honor, not to imperil my lawsuit, I happened to think, perhaps we can stipulate to this without reopening the case, will you stip-

ulate that Mr. Erickson had his premium returned to him, whether or not he cashed the check, but it was sent to him?

Mr. Friedman: In view of the stipulation, he turned it [158] back to the company through me.

Mr. Walcom: Will you stipulate that the premium was returned?

Mr. Friedman: Attempted to return it and we sent it back, yes.

The Court: But it didn't come at the time, had not been received at the time of December 17th?

Mr. Friedman: Wait a minute.

Mr. Walcom: Speaking of the Allstate premium; you see, he paid his premium.

The Court: The \$132.00.

Mr. Walcom: That is right, that was returned.

Mr. Friedman: That was an attempt, and we sent it back.

The Court: All right. That will be in ten days, then.

Mr. Walcom: May I have five days to reply to counsel?

Mr. Friedman: I am giving mine first?

Mr. Walcom: You asked leave, did you not?

Mr. Friedman: All right, very well.

The Clerk: November 5 for submission. [159]

[Endorsed]: Filed March 29, 1955.

[Endorsed]: No. 14708. United States Court of Appeals for the Ninth Circuit. Allstate Insurance Company, a corporation, Appellant, vs. Oscar F. Erickson, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: April 1, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14708

ALLSTATE INSURANCE COMPANY, a cor-
poration, Appellant,
vs.

OSCAR F. ERICKSON, Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

The points upon which appellant intends to rely
in this appeal are as follows:

I.

That appellee had been cancelled as a policy-

holder of the State Farm Mutual Insurance Company before he applied to Allstate Insurance Company for a policy.

II.

That the misrepresentation by appellee in failing to disclose that his previous insurance policy had been cancelled when he applied to Allstate Insurance Company for a new policy was a breach of warranty, which prevented the policy issued by Allstate Insurance Company from attaching to the risk.

III.

That when appellee concealed from Allstate Insurance Company that State Farm Mutual Insurance Company had previously cancelled his policy, his concealment of this material fact was a breach of warranty which entitled Allstate Insurance Company to rescind the policy which it then issued in ignorance of the fact of the concealment by appellee.

IV.

That the failure of appellee to disclose that his previous policy was cancelled by State Farm Mutual Insurance Company was a breach of warranty which misled Allstate Insurance Company into issuing a policy it would not have issued if there had been no concealment and the policy issued in reliance on facts which were not true because of the

appellee's concealment and misrepresentation caused this policy, which was issued, to be void.

Dated: April 4, 1955.

Respectfully submitted,

HEALY & WALCOM,
/s/ LEO J. WALCOM,
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed April 4, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant hereby adopts and incorporates by reference, the designation of record heretofore filed in the United States District Court for the Northern District of California, Southern Division, as its designation of record in the appeal of this cause.

Dated: April 4, 1955.

HEALY & WALCOM,
/s/ LEO J. WALCOM
Attorneys for Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed April 4, 1955. Paul P. O'Brien,
Clerk.

